Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1995

THOMAS R. ZIMMER and SUZANNE K. ZIMMER,

Petitioners,

vs.

AMERICAN TELEPHONE AND TELEGRAPH COMPANY OF MICHIGAN, a Michigan corporation, MICHIGAN BELL TELEPHONE COMPANY, a Michigan corporation, and COMMUNICATIONS WORKERS OF AMERICA, NATIONAL AND COMMUNICATIONS WORKERS OF AMERICA LOCAL 4009,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeal For The Federal District

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a Court may deprive Petitioner of a jury decision on a question of fact as to when the statute of limitations commenced, where the starting of the statute of limitations rested on the interpretation of a letter.

2. Whether the imputation of a six month statute of limitation is appropriate where said application clearly goes against the legislative history of 29 USC § 160(b).

3. Whether the application of the statute of limitations in 29 USC § 160(b) as applied in *DelCostello v. The International Brotherhood of Teamsters,* was in violation of the Rules of Decision Act 28 USC § 1652.

PARTIES

The parties in this case are Petitioners, Thomas R. Zimmer and Suzanne K. Zimmer, the Respondents, American Telephone and Telegraph Company of Michigan, Michigan Bell Telephone Company, Communications Workers of America, National and Communications Workers of America Local 4009.

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REPORTED OPINIONS IN THIS CASE

Both the opinion in the Circuit Court and the opinion of the Court of Appeals were not published.

JURISDICTION

The Court of Appeals for the Federal District issued its opinion and entered judgment on February 21, 1996. App. 1. The jurisdiction of the Court rests upon 28 U.S.C. § 1254(1).

STATUTE AND REGULATIONS

The statutes at issue are 29 U.S.C. § 185, 28 U.S.C. § 1331, 29 U.S.C. § 160(b). The text of the statutory and regulator provisions appear in the Appendix. See App. 71.

STATEMENT OF THE CASE

Petitioners Thomas R. Zimmer and Suzanne K. Zimmer ("Zimmer"), had their lawsuit dismissed based on a statute of limitations defense raised by Respondents. The dismissal was predicated upon judicial fact finding as to the commencement date of the claim period and denied Petitioner their right to have a jury determine the applicable period of time. Further, the limitation period was not statutory, but judicially created in contradiction to the legislative intent behind the statute. Zimmer seeks review of the decision of the Court of Appeals which upheld the dismissal of the District Court Judge.

Thomas R. Zimmer (hereinafter referred to as "Zimmer"), was employed as an installer/repairman by

Defendant, Michigan Bell Telephone Company (hereinafter referred to as "Bell") beginning June 25, 1973. While Zimmer was employed with Bell, Bell was a subsidiary of its parent corporation, American Telephone and Telegraph Company of New York. (hereinafter referred to as "AT&T")[1]

Pursuant to a court ordered divestiture, Bell ceased to be a subsidiary of AT&T effective January 1, 1984. At the time of the divestiture and pursuant to AT&T's plan for reorganization Bell solicited Zimmer's preference between working for AT&T or Bell. This plan for reorganization submitted by AT&T to the U.S. District Court was created without the assistance and consultation of Communication Workers of America, National and/or Communications Workers of America Local 4009. Zimmer chose to work for AT&T.

On or about January 1, 1984, Zimmer began working for AT&T and spent the remainder of his time there as an installer/repairman. On September 29, 1989, Zimmer was terminated due to work force adjustments. On September 29, 1989, AT&T submitted a termination packet to Zimmer. Zimmer completed all the forms contained in the termination packet including the "recall interest form". All of these forms were turned in to AT&T as required. Although Zimmer was unemployed, he expected to be recalled.

In January of 1990, Zimmer was contacted by his Union to attend a class to help terminated employees find other employment. At this class, Zimmer spoke with the Union Secretary/Treasurer, Judy Wicker, and told her that he had not been contacted by either AT&T or Bell. Ms. Wicker responded by stating that both companies were laying off more employees and that rehiring would be

done on a seniority basis. Subsequently, in September of 1991, Zimmer spoke with an old Bell Supervisor, Wally Hytenin, regarding layoffs and rehiring. Mr. Hytenin told Zimmer that everyone who had been laid off was recalled.

A series of correspondence began with both Zimmer's Union, AT&T and Bell regarding their failure to recall Zimmer. On September 29, 1991, Zimmer's two (2) years of Bell recall rights lapsed. It was at this time that Zimmer began the grievance process.

In October of 1991, Zimmer spoke with Union President, Dominic Guadagni regarding his problem. While Zimmer was in his office, Mr. Guadagni phoned Bell to ask them why Zimmer was not recalled. Bell answered that it was because AT&T never sent Zimmer's termination packet containing the recall interest form to Bell. Zimmer confirmed with Mr. Guadagna that a grievance on his behalf would be initiated.

Although Zimmer was advised that his grievance would be initiated, he began his own search for the missing "recall interest form." Between October of 1991, when Zimmer spoke with Dominic Guadagni, and August 10, 1992 Plaintiff corresponded with both AT&T, Bell and Communication workers of America in search of the missing "recall interest form". During this search Zimmer made telephone calls and sent countless correspondence to AT&T, Bell and Communication Workers of America requesting any and all information regarding the paper trail or said "recall interest form." Zimmer had been told that if the missing "recall interest form" was in his file, he would have already had a job. This endless search for the subject form created the factual basis for Mr. Zimmer's grievance and this claim. During his search

Zimmer was advised that a grievance had been initiated on his behalf in order to solve his problem. In addition, there was no clear date as to when AT&T misplaced and/or lost the form. In September of 1992, Zimmer spoke with Lou Pelton, an AT&T representative in Lansing. Lou Pelton told Zimmer that they had recently lost a basement full of terminated employee files. From this information Zimmer's search continued in order to find out whether his file was among those that had been lost. After innumerable hours, days, months and years of investigations, Zimmer has never received a conclusive statement from either AT&T or Bell regarding the paper trail of his "recall interest form".

On August 11, 1992, Zimmer resubmitted to AT&T the recall interest form that was misplaced by AT&T in September of 1989. When Zimmer resubmitted said recall interest form, employees who were laid off and had less seniority than Zimmer had been rehired by both Michigan Bell and AT&T.

Prior to his search in October of 1991, Zimmer initiated the grievance process and was advised that it was proceeding. On January 29, 1992, Zimmer wrote the Union president, Morton Bahr, explaining the situation and requesting a status report on his grievance. Mr. Bahr forwarded the letter to Union Representative, Richard T. Jordan. On March 8, 1993, Mr. Jordan responded by letter stating that he would be happy to discuss the matter. On March 10, 1993, Mr. Jordan and Zimmer met. At that meeting Zimmer reminded Mr. Jordan that he would like his grievance and the lost form given more attention. Zimmer also stated that if a fair settlement could not be reached through grievance he would like to arbitrate the matter. On June 23, 1993, Mr. Jordan wrote to Zimmer

stating that he had investigated the matter and that AT&T could not locate his "recall interest form." Furthermore, although an appeal and arbitration were requested of the Union, no action was taken. In response to the June 23, 1993 letter, on July 28, 1993, Zimmer wrote the Union again requesting information regarding his grievance. A letter from a union representative was not the final step in the grievance procedure. Therefore, Zimmer attempted to contact Mr. Jordan and Mr. Bahr by telephone to request arbitration of his dispute. Finally, on August 30, 1993, after Zimmer had exhausted his attempts to request arbitration, he decided to consider his options through the Courts. On October 20, 1993, Zimmer requested his entire employment file from AT&T under the Bullard-Plawecki Act. Upon receipt of his file, he noticed that there was no "recall interest form."

REASONS FOR GRANTING PETITION

This case centers on the date that Petitioner knew that a cause of action had accrued either against his Union or his employer. This is a genuine issue of material fact as to when the statute of limitations accrued on Petitioner's claim. This question of fact should be the province of the jury and not be judicially decided.

Moreover, pursuant to legislative history, it is clear that 29 USC § 160(b) which contains the six (6) month statute of limitations applied by *DelCostello v. Intl. Bhd. of Teamsters*, 462 U.S. 151, 103 S. Ct. 2281, 76 L. Ed. 2d 476 (1983), in hybrid cases was clearly not written expressly to apply to § 301 hybrid cases. In fact, one of its main purposes was to encourage the Union and management to expedite claims. Furthermore, the Legislature did not intend that 29 USC § 160(b) and the six (6) month statute

of limitations apply outside of the grievance process. Therefore, the six (6) month statute should not be applied and a more analogous state statute should be controlling.

I. THERE IS A GENUINE ISSUE OF MATERIAL FACT AS TO THE ACCRUAL OF THE STATUTE OF LIMITATIONS LOCATED IN 29 USC § 160(b).

In *Scott v. Local 863, Intl. Bhd. of Teamsters*, 725 F.2d 226 (1984) the Court in quoting *Clayton v. Automobile Workers*, 451 U.S. 679, 689-93, 101 S. Ct. 2088, 68 L. Ed. 2d 538 (1981), stated that " . . . the Court has created a case by case factual standard turning on the issue of when it becomes clear that further internal appeals would be futile." In *Scott, supra,* 35 laid off employees brought suit against their Union and their employers charging the Union with breach of the duty of fair representation and the employers with a breach of the Collective Bargaining Agreement.

In *Scott, supra,* between October 23 and October 30 of 1981, Defendant, employers, laid off 28 employees who were Union members. Nine (9) of those employees were subsequently rehired as a result of arbitration unrelated to the case. In the Third Circuit Appellate Court's opinion, the Court referred to the initial group of 19 laid off employees as the "October Plaintiffs". Furthermore, on April 8, 1982, Defendant employers laid off 16 more employees, including the nine (9) who had been reinstated as a result of the arbitration. The Court referred to these 16 employees as the "April Plaintiffs". On February 5, 1982, three and a half months after the initial layoffs, the local Union advised counsel for the October Plaintiffs that it did not intend to proceed to arbitration on their behalf. On February 17, the October Plaintiffs' attorney replied that his clients would appeal the decision of the

local Union to the local as well as the Regional Joint Counsel and the International. The Union responded on February 22, that, since the dispute involved the interpretation and application of the local Collective Bargaining Agreement, the matter was within the sole discretion of the local. On March 5, 1982, the local Union granted the October Plaintiffs one last appeal to its Executive Board. The Executive Board's conclusion on April 7, 1982, was that the union determined not to proceed to arbitration regarding the October Plaintiffs. Regarding the April Plaintiffs, on May 14, a letter was sent by the local declaring that the layoff of the April Plaintiffs would also not be arbitrated. Consequently, as stated earlier, the lawsuit on behalf of 35 laid off employees was filed on October 8, 1982. The District Court dismissed said Complaint as not timely filed.

In applying this six (6) month statute of limitations, retroactively, pursuant to *DelCostello v. Intl. Bhd. of Teamsters*, 462 U.S. 151, 103 S. Ct. 2281, 76 L. Ed. 2d 476 (1983), the Court in *Scott, supra,* faced the issue as to when said statute of limitations began to run. In the majority opinion, the *Scott, supra,* Court recognized that even though the October Plaintiffs received a letter form the local Union of February 5, 1982, stating that they would not proceed to arbitration, the October Plaintiffs internal grievance procedures were not over. In fact, the local Union later granted these October Plaintiffs an appeal to its Executive Board on March 5. On April 7, 1982, said Executive Board concluded that the Union would not proceed to arbitration regarding the October Plaintiffs. To this end, the Court stated:

> *"Only if the April 7 letter of local counsel reaffirming the refusal by local 863 to proceed to arbitration is taken as the termination of the internal appeal procedure and if the statute of limitations is held to*

begin running when that letter was received by Plaintiff's counsel (rather than the date of mailing) can this suit survive for the October Plaintiffs under DelCostello.

Should the District Court find that under the applicable rules, the mailing date begins the running of the statute of limitations, this would preclude suit by the October Plaintiffs regardless of when the futility of further internal Union appeals is determined to have become apparent. . . . We do not believe that it is proper for this Court presently to undertake this assignment, especially in the absence of a factual record on this subject from the trial Court." (Id. at 229)

For these reasons, the Court remanded the case back to the District Court for further proceedings. However, in concurrence with the majority, Judge Becker outlined the factual and legal issues for the District Court to follow.

First, Judge Becker described the dilemma that the Courts have created regarding hybrid § 301 cases. Judge Becker stated:

"Under existing case law, the union can argue, subject to the limitations set forth in Clayton v. Automobile Workers, 451 U.S. 679, 689, 101 S. Ct. 2088, 68 L. Ed. 2d 538 (1981), that these procedures are genuinely available and bar the Defendant from suit. That situation existed in this case: Local 863 originally pleaded in its answer in the District Court that the action should be dismissed for want of exhaustion but has abandoned the claim. Assume further, however, that the union argues that, because the availability of real internal remedies ceased more than six (6) months ago and because suits against the union were thus permissible under Clayton for more than six (6) months before the Plaintiff filed suit, the DelCostello statute of limitation now bars the employees action against it." (Id. at 229)

Further on, Judge Becker states:

"The problem is that, unlike other situations where the twin defenses of failure to exhaust and the statute of limitations combined to give the litigant a narrow window in which to file suit, here there is no guaranty that statute, regulations or other forms of clear, written notice will exist that warn the Plaintiff of his peril. On the contrary, precisely because the majority here has allowed it to benefit them in litigation, Union officials may well be equivocal or contradictory in their communications to dissatisfied members and may send such communications through persons within the internal Union hierarchy whose authority to bind the union is at best hazy. As a result, the potential suitor will not know when exhaustion is futile . . . if it is thereby determined that the suitor has not exhausted, his day in Court is, at worst, delayed. But if, in reliance on what he thought were genuine internal remedies, he refrains from suing for as much as six (6) months, and it is ultimately determined that these remedies were illusory, his suit will be forever barred . . . to avoid this trap, employees Plaintiffs will have to file numerous precautionary lawsuits – each of which will require the Courts to undertake the bootless inquiry described below – in the hopes that perhaps one of the suits will have been timed correctly." (Id. at 230 emphasis supplied)

In framing a rule for the District Court to follow, Judge Becker stated:

"I think we should eliminate guesswork by conditioning Union use of this pincer defense on its compliance with the rule of fundamental fairness. Specifically, a Defendant . . . in a suit under § 301 of the LMRA should be able to invoke the Clayton 'futility exception' and thus start the DelCostello statute of limitations running only from the time that the employee has received from it a clear, written

statement telling him that further internal appeals are futile, and that time for judicial action has begun. This would be analogous to a right to sue letter in employment discrimination law. Alternatively – and I believe equivalently – the Union may start the statute of limitations running by waiving (in equally expressed terms) any reliance on its right under Clayton to bar suits for the failure of the employee to exhaust internal Union remedies." (Id. at 230-231)

In the instant case, Zimmer was placed in this judicially created troublesome dilemma described by Judge Becker. Zimmer relied on his Union as his exclusive bargaining agent during his employ and after termination with AT&T and Bell. Furthermore, Zimmer was advised on several occasions that the Union initiated a grievance on his behalf. As Respondents would have it, the six (6) month statute of limitations began to accrue on June 23, 1993 when a mere Union representative, Richard T. Jordan, wrote a letter to Mr. Zimmer stating that AT&T had no record regarding the recall interest form. Zimmer responded by letter on July 28, 1993 requesting the status of his grievance. Moreover, at no time did the Union state that "further internal appeals were futile, and the time for judicial action had begun". The Honorable U.S. District Judge Avern Cohn's opinion in this case even stated "the June 23, 1993 letter is not as explicit as it might be . . . " at page 13. In addition, Zimmer believed that since this letter was from a mere Union representative, "whose authority to bind the Union was at best hazy", this letter was not the Union's final word on this dispute. Simply put, Zimmer continued seeking his internal Union remedies after he received the June 23, 1993 letter as is evident by his July 28, 1993 letter to the Union requesting grievance information. To this day, Zimmer has not

received any conclusive remarks from the Union regarding his grievance.

Zimmer relied on what he thought were genuine internal remedies, and pursuant to that belief, he refrained from suing the Union and his employers. Therefore, at the earliest, Plaintiff's cause of action under § 301 against his Union and his employer accrued on August 30, 1993 when he began seeking relief through the Court system. An issue to be decided by a jury not judiciary.

II. THE TRIAL COURT'S RELIANCE ON THE STATUTE OF LIMITATIONS IN 29 USC § 160(b) AS APPLIED IN *DELCOSTELLO V. THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS*, 462 U.S. 151 (1983) WAS IN DERIVATION/VIOLATION OF THE RULES OF DECISION ACT LOCATED AT 28 USC § 1652, THE ERIE DOCTRINE AND APPLICABLE LAW.

A. THE RULES OF DECISION ACT, 28 USC § 1652

The Rules of Decision Act, located at 28 USC § 1652 states:

> *"The laws of the several states, except where the Constitution or treaties of the United States or acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the Courts of the United States, in cases where they apply."*

In *DelCostello, supra,* at 158, the Court stated:

> *"As is often the case in Federal Civil Law, there is no Federal statute of limitation expressly applicable to this suit."*

The *DelCostello* Court expressly stated that neither the Constitution, treaties of the United States or acts of Congress required or provided a statute of limitations for

a Plaintiff's cause of action against his employer and his union under the National Labor Relations Act.

Because the exception to 28 USC § 1652 was not met in *DelCostello* and is not met in the instant case, that statute tells us that "the laws of the several states . . . shall be regarded as rules of decision in civil actions in the Courts of the United States . . . "

In applying the Rules of Decision Act, 28 USC § 1652, to the facts and circumstances in *DelCostello, supra,* and the instant case it is clear that since, as the Court in *DelCostello* expressly stated, neither the Constitution, treaties of the United States or acts of Congress required or provided a statute of limitation for a Plaintiff/ Employee's cause of action under the National Labor Relations Act the trial court should apply the law of the several states to such a claim.

In *DelCostello,* the Court, in effect, carved out a new exception to the Rules of Decision Act in stating:

> *" . . . when a rule from elsewhere in Federal law clearly provides a closer analogy then available state statutes, and when the Federal policies at stake and the practicalities of litigation make that rule a significantly more appropriate vehicle for interstitial lawmaking, we have not hesitated to turn away from state law." Id.* at 171-172.

In summary, the *DelCostello* Court decided that when adoption of a state statute would be at odds with the purpose or operation of Federal substantive law, the Court may chose a Federal statute which more closely promotes the Federal policies at stake and the practicalities of litigation.

The holding in *DelCostello, supra,* is in direct conflict with the Rules of Decision Act and promotes the equivalent of a heavyweight title bout rematch presenting in one corner a collaborated contender made up of the Rules of

Decision Act and the Erie Doctrine versus what is held out as the reigning champion: *DelCostello, supra,* promoting a Federal common law. Since the Rules of Decision Act is clearly relevant and applicable in this case it is important to consider the precedential value and effect of cases interpreting the Act.

B. THE ERIE DOCTRINE

The seminal case regarding interpretation of the Rules of Decision Act is *Erie Railroad Company v. Harry J. Thompkins,* 304 U.S. 64 (1938). The general holding in *Erie, supra,* was that in the absence of an explicit, governing federal law, a federal court must follow state common law decisions, state statutes and state constitutional provisions.

In *Erie, supra,* Thompkins, a citizen of Pennsylvania, brought his personal injury lawsuit against a New York railroad corporation in New York Federal Court based on diversity jurisdiction. The railroad argued that its duty to Thompkins should be interpreted under Pennsylvania law where the highest Court in that state held that no duty was owed to a Plaintiff similarly situated to Thompkins. Thompkins responded by stating that since there was no state statute on the subject, the railroad's duty and liability was to be determined in Federal Court as a matter of general law. The trial judge refused to follow Pennsylvania law and after trial a jury verdict was entered in favor of Thompkins. On appeal, the railroad claimed that application of the Pennsylvania rule was required pursuant to the Rules of Decision Act. The appellate court affirmed the trial court's ruling citing a prior Supreme Court case, *Swift v. Tyson,* 16 Pet. 1, 10 L. Ed. 865 (1842) reasoning that:

" . . . it was unnecessary to consider whether the law of Pennsylvania was as contended, because the question, was one not of local, but of general, law and that upon questions of general law the Federal Courts are free, in absence of a local statute, to exercise their independent judgment as to what the law is . . . " (See Erie, supra, at 65)

In reversing the appellate court, the U.S. Supreme Court stated in part:

"Except in matters governed by the Federal Constitution or by acts of congress, law to be applied in any case is the law of the state. And whether the law of the state shall be declared by its legislature in a statute or by its highest court in a decision is not a matter of federal concern. There is no federal general common law. Congress has no power to declare substantive rules of common law applicable in a state whether they be local in their nature or general, be they commercial law or part of the law of torts. And no clause in the constitution purports to confer such a power upon the Federal Courts . . . supervision over either the legislative or the judicial action of the states is in no case permissible except as to matters by the constitution specially authorized or delegated to the United States. Any interference with either, except as thus permitted, is an invasion of the authority of the state and, to that extent, a denial of its independence." (Id. at 69-70)

In *Hanna v. Plummer*, 380 U.S. 460, 14 L. Ed. 2d 8, 85 S. Ct. 1136 (1965), the Court followed *Erie, supra,* while expanding on the Erie doctrine. In that case, Plaintiff, a citizen of Ohio, filed her auto negligence lawsuit in the United States District Court for the District of Massachusetts against a Massachusetts citizen. Plaintiff served the complaint in compliance with Federal Civil Procedure Rule 4(d)(1) by serving copies of the Summons and Complaint on the Plaintiff's executor's wife at his residence.

Because Massachusetts law required service by delivery in hand upon the executor, the District Court entered summary judgment for Defendant. The Court of Appeals for the First Circuit affirmed. The U.S. Supreme Court reversed the Court of Appeals decision in an opinion delivered by Chief Justice Warren.

Defendant argued that Erie required application of the state rule. In turn, Plaintiff argued that the Rules Enabling Act (at 28 USC § 2072) validated the application of the Federal Rule. In applying the federal rule, the court alluded to the *Erie* holding which generally stated that pursuant to the Rules of Decision Act, in the absence of an explicit federal law, federal courts are required to apply state law. The *Hanna, supra,* court distinguished itself from *Erie* in that an explicit federal law existed which was in direct conflict with the state law. In turn, the *Hanna* court concluded that the federal rule on service of process was supported by a grant of federal authority under the Rules Enabling Act and therefore met the exception to the Rules of Decision Act.

It is important to note that the holdings in both *Erie* and *Hanna* were entirely consistent with the Rules of Decision Act located at 28 USC § 1652. The *Erie* court followed state law since neither the constitution, treaties of the United States nor acts of Congress provided for a federal law in that instance. The *Hanna* court held in part that since the exception to the Rules of Decision Act was met to wit: The Rules Enabling Act, an act of Congress, provided for a federal rule on point, the court was justified in disregarding the state rule.

In the instant case, the precedential value of both *Erie* and *Hanna* is high. Both of these cases require that when a choice of law question arises in Federal Court between federal and state law, the Court should apply state law

unless the exception to the Rules of Decision Act is met. Neither of these decisions expanded or limited the scope of the Rules of Decision Act located at 28 USC § 1652. Furthermore, in *DelCostello, supra,* the court admits that there was no federal statutes or rules expressly applicable in that lawsuit. However, the court carved out a new exception to the Rules of Decision Act applying a balancing test to the choice of law decision.

Petitioner respectfully submits that the holding in *DelCostello, supra,* is in direct derivation and violation of the Rules of Decision Act 28 USC § 1652 and that the Court should apply a state statute of limitation to Zimmer's lawsuit herein.

The dissenting opinions in *DelCostello* agree with the above reasoning.

Justice Stevens wrote in part:

> *"For the past century Federal Judges have 'borrowed' state statutes of limitations, not because they thought it was a sensible form of 'interstitial lawmaking,' but rather because they were directed to do so by the Congress of the United States (pursuant to the Rules of Decision Act).*
>
> *Today the Court holds that the Rules of Decision Act does not determine the result in these cases, because it believes that a separate federal law, growing out of 'the policies and requirements of the underlying cause of action,' . . . 'otherwise requires or provides'. The Court's opinion sets forth a number of reasons why it may make good sense to adopt a six month statute of limitations, but nothing in that opinion persuades me that the Constitution, treaties or statutes of the United States 'require or provide' that this particular limitations period must be applied to this case.*
>
> *Congress has given us no reason to depart from our settled practice, grounded in the Rules of Decision*

> *Act, of borrowing analogous state statutes of limitation in cases such as this. For the reasons set forth in my separate opinion in United Parcel Service, Inc. v. Mitchell, 451 U.S. 56, 71 (1981) I believe that in a suit for breach of the duty of fair representation, the appropriate 'laws of the several states' are the statute of limitations governing malpractice suits against attorneys." (Id. at 172-174)*

In Mitchell, the Court cited *Auto Workers v. Hoosier Cardinal Corp.*, 383 U.S. 696, 704-705, 16 L. Ed. 2d 192, 86 S. Ct. 1107 (1966) for the proposition that:

> *"The timeliness of a § 301 suit . . . is to be determined, as a matter of federal law, by reference to the appropriate state statute of limitations." (See Mitchell, supra, at 60)*

In *Auto Workers v. Hoosier Corp.*, the Union sued the employer on behalf of one of its members for breach of the Collective Bargaining Agreement. The Federal District Court applied the state six year statute of limitations governing contracts not in writing and dismissed Plaintiff's complaint as untimely. The Court of Appeals and the United States Supreme Court affirmed the holding of the District Court approving of the District Court's application of the six year state statute of limitations governing contracts not in writing.

On cert the Union contended that its suit should not be barred by the statute of limitations enacted by a state. The Union urged the court instead to devise a uniform time limitation to close the statutory gap left by Congress. The Union was asking the court for a longer statute of limitations. In response the Court stated:

> *"It is true that if state limitations provisions govern § 301 suits, these suits will lack a uniform standard of timeliness. It is also true that the subject matter of § 301 is 'peculiarly one that calls for uniform law.' "*

Citing Teamsters Local v. Lucas Flower Company, supra, at 103.

However, the Court went on to state that it has in the past defined the need for uniformity in labor law in terms very different from those suggested by the Union. In quoting *Lucas Flower Company, supra,* at 103-104, the Court defined the need for uniformity in labor law as follows:

> *"The possibility that individual contract terms might have different meanings under two systems of law would inevitably exert a disruptive influence upon both the negotiation and administration of collective agreements. Because neither party could be certain of the rights which it had obtained or conceded, the process of negotiating an agreement would be made immeasurably more difficult by the necessity of trying to formulate contract provisions in such a way as to contain the same meaning under two or more systems of law which might some day be invoked in enforcing the contract. Once the collective bargain was made, the possibility of conflicting substantive interpretation under competing legal systems would tend to stimulate and prolong disputes as to its interpretation. Indeed, the existence of possibly conflicting legal concepts might substantially impede the parties willingness to agree to contract terms providing for final arbitral or judicial resolution of disputes.*
>
> *. . . the ordering and adjusting of competing interest through a process of free and voluntary collective bargaining is the keystone of the federal scheme to promote industrial peace. State law which frustrates the effort of Congress to stimulate the smooth functioning of that process thus strikes at the very core of federal labor policy." (Id. at 702)*

From the above quote, the Hoosier Court concluded that the need for uniformity was greatest when the smooth function of the formation of the Collective Bargaining

Agreement and the private settlement of disputes under same were threatened. The Court went on to state that statutes of limitation only come into play when the collective bargaining processes have already broken down. In further support for application of the state statute of limitation in a lawsuit under § 301, the Court stated:

> *"Lack of uniformity in this area (choosing a state statute of limitations) is therefore unlikely to frustrate in any important way the achievement of any significant goal of labor policy. Thus, although a uniform limitations provision for § 301 suits might well constitute a desirable statutory addition, there is no justification for the drastic sort of judicial legislation that is urged upon us." (Citing Smith v. Evening News Association, supra, at 203)*

The Rules of Decision Act was enacted in 1789. In substance this act has been in effect since that time. The *Hoosier* court cited a case decided in 1830 which followed the Rules of Decision Act in holding that state statutes of limitations govern the timeliness of federal causes of action unless Congress had specifically provided otherwise. (See *McClunny v. Silliman*, 3 Pet. 270, 277 (1830)). Since 1789 Federal Courts have continually applied state statutes of limitations for federal causes of action which did not require or provide a limitation. In *Hoosier, supra,* at page 704, the Court cited several cases in which a state statute of limitations was applied to a cause of action arising out of a federal statute or act. Furthermore, as the *Hoosier* court pointed out, in the past, if Congress disagreed with the Court's interpretation of a federal statute which omitted a period of limitation, Congress would respond by enacting a uniform period of limitations. (*Id.* at 704) Congress has not done that in this case. With this in mind, the Hoosier Court stated:

> *"Against this background, we cannot take the omission in the present statute as a license to judicially devise a uniform time limitation for § 301 suits. Accordingly, since no federal provision governs, we hold that the timeliness of a § 301 suit, such as the present one, is to be determined, as a matter of federal law, by reference to the appropriate state statute of limitations." (Id. at 704)*

In the instant case, the District Court followed *DelCostello* which admittedly borrowed the six month period expressly governing unfair labor practice internal grievance proceeding contained in 29 USC § 160(b) and superimposed it on an employees cause of action for a wrongful act occurring within that internal process when it was not intended for that purpose.

The *DelCostello* Court attempts to distinguish itself from *Hoosier, supra.* The *DelCostello* Court stated that national uniformity was of less importance in *Hoosier, supra,* because that case did not involve "those consensual processes that federal labor law is chiefly designed to promote – the formation of the collective agreement and the private settlement of disputes under it". (*DelCostello* at 702) In *DelCostello* the Court said that since Plaintiff in that case sued both his employer for breach of the Collective Bargaining Agreement and the Union for unfair representation, national uniformity was of great importance because, as the Court inferred, the formation of the collective agreement and the private settlement of disputes under it were involved. Moreover, the *DelCostello* Court eluded to the definition of national uniformity in labor law espoused in *Hoosier* which stated that the application of a state statute of limitations to an employees' cause of action against his employer did not "frustrate in any important way the achievement of any significant goal of labor policy i.e. the smooth functioning

of those consensual processes that federal labor law is chiefly designed to promote – the formation of the collective agreement and the private settlement of disputes under it". (See *Hoosier* at 702) However, the *DelCostello* Court felt that a hybrid § 301/fair representation claim amounted to "a direct challenge to the private settlement of disputes under the Collective Bargaining Agreement." (*DelCostello* at 165) However, merely because an employee's claim against his union for unfair representation amounts to a direct challenge to the private settlement of disputes under the Collective Bargaining Agreement, this does not justify the drastic sort of judicial legislation which occurred in *DelCostello*. In further support for its position, the *DelCostello* Court stated that, unlike the single claim against the employer in *Hoosier*, *DelCostello's* hybrid § 301/fair representation claim had no close analogy in ordinary state law. In *Mitchell, supra*, Justice Stewart suggested that a state statute regarding attorney malpractice most closely fits an employee's cause of action against his union for unfair representation. The *DelCostello* Court dismissed this suggestion since:

> *"It suffers from flaws . . . of practical application in view of the policies of federal labor law and the practicalities of hybrid § 301/fair representation litigation." (Id. at 165)*

The *DelCostello* Court also went on to state that application of a longer malpractice statute as against unions would preclude the relatively rapid final resolution of labor disputes favored by federal law. Here it is important to note that earlier in its opinion, the *DelCostello* Court agreed with the policy considerations behind the National Labor Relations Act explained in *Hoosier, supra*. In *Hoosier, supra*, the policy behind the National Labor Relations Act was to facilitate the smooth functioning of

those consensual processes that federal labor law is chiefly designed to promote – the formation of the collective agreement and the private settlement of disputes under it. (See *Hoosier* at 702) Therefore, when the rapid final resolution of labor disputes pursuant to the collective bargaining process breaks down (i.e. an employee's lawsuit for unfair representation against his representative, the union) the policy behind that process ceases to exist. Logically, it cannot be said that the policy behind the National Labor Relations Act was to encourage the rapid final resolution of labor dispute in the courts of our nation. The implementation of such a policy would clearly abrogate an aggrieved party's constitutional rights protected by existing law and process.

The *DelCostello* Court applied the six month statute of limitations contained in 29 USC § 160(b) because it felt that that statute was actually designed to accommodate a balance of interests very similar to that at stake in a hybrid § 301/fair unfair representation. The Court felt that by analogy said statute was more apt than any of the suggested state law parallels. In support of the above conclusion, the *DelCostello* Court quoted Justice Stewart, who observed in *Mitchell*:

> *"In . . . the NLRA, Congress established a limitations period attuned to what it viewed as the proper balance between the national interest in stable bargaining relationships and finality of private settlements, and an employee's interest in setting aside what he views as an unjust settlement under the collective bargaining system. That is precisely the balance at issue in this case. The employee's interest in setting aside the 'final and binding' determination of a grievance through the method established by the Collective Bargaining Agreement unquestionably implicates 'those consensual processes that federal*

labor law is chiefly designed to promote – the formation of the . . . agreement and the private settlement of disputes under it.' (Hoosier, 383 U.S. at 702)

"Accordingly, the need for uniformity among procedures followed for similar claims, as well as the clear congressional indication of the proper balance between the interests at stake, counsels the adoption of § 10(b) of the NLRA as the appropriate limitations period for lawsuits such as this." (See Mitchell, supra, at 451 U.S. 70-71)

However, it is clear from the legislative history of 29 USC § 160(b) that Congress did not consider an "employee's interest in setting aside what he views as an unjust settlement" by utilizing the Courts. *29 USC § 160(b) was only intended to apply to internal labor processes. Once that process breaks down the policy considerations behind same cease to exist.*

Again the Court cites the twin goals of federal labor law to wit: uniformity in the laws governing the formation of the agreement of a Collective Bargaining Agreement and the private settlement of disputes under it. When Congress enacted 29 USC § 160(b) it envisioned a system where the union was representing the employee in an internal unfair labor practice proceeding. Clearly, one of the intentions behind the inclusion of this six month provision was to encourage the rapid final private resolution of the labor dispute between an employer and an employee. It is clear from the language of 29 USC § 160(b) and the legislative history behind same that when the internal collective bargaining process breaks down because the union fails to competently represent its members the six month provision has no application. Interestingly enough, the very fact that 29 USC § 160(b) required that a complaint of unfair labor practice against an employer be filed by the Administrator within six

months of the charge could be the subject of an employee's lawsuit against his union for unfair representation if the union failed to timely file that charge with the board within the prescribed time period. Once a labor dispute is taken outside of the internal labor process, the balancing test as explained in *DelCostello, supra,* behind the six month provision is no longer applicable since a private settlement of that dispute is no longer possible.

Moreover, the conflict between *Hoosier, supra,* and *DelCostello, supra,* continues to exist. If an employee names only his employer in a lawsuit under § 301, *Hoosier, supra,* tells us that the federal court must apply the most closely analogous state statute of limitations. However, *DelCostello, supra,* tells us that if the employee names both his employer and the union a six month statute of limitation applies to both Defendants. Clearly, these inconsistent results will allow a Plaintiff/Employee to take advantage of the joinder rules in the Federal Rules of Civil Procedure 19 and 20 and split a cause of action to obtain a different result. This is simply impractical. However, if the court applied the most closely analogous state statute of limitations in all cases then such an inconsistent result will be avoided.

In *Fischbach and Moore, Inc. v. International Union of Op. Eng.*, 198 F. Supp. 911, 915 (1961) the Court stated that in cases where there is an absence of a specific federal statute of limitation five possible solutions may be chosen:

> *"(1) Utilization of state statutes of limitations;*
> *(2) Utilization of an arbitrary, judicially-enacted, period to be applied in all similar cases;*
> *(3) Utilization of an analogous federal statute of limitations;*
> *(4) Utilization of the equitable doctrine of laches; and*

(5) Utilization of no period of limitations at all."

Doubtless, all of these possible solutions have been employed by some courts in some situations. In choosing option (1) the *Fischbach* court stated:

> *"It is the court's strong opinion that where a choice of policy is to be made which limits the exercise of a legislatively created right, such choice is obviously most appropriately to be made by the legislative branch of the government . . . it is up to Congress to determine the cutting off point at which such claims are to be conclusively determined to be stale." (Id. at 915)*

The Rules of Decision Act tells us that "the laws of the several states" shall be applicable in civil actions in the Courts of the United States except when the Constitution, treaties of the United States and/or acts of Congress otherwise require or provide. The Erie Doctrine tells us that except in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the state. The *Hoosier, supra,* Court explained that the policy of encouraging a smooth functioning collective bargaining process does not extend past the instance where that process breaks down and an employee chooses to avail himself of the Court's processes. That Court also stated that there was no justification for the drastic sort of judicial legislation urged by those who recommend the application of 29 USC § 160(b) in cases such as this one. In addition, the *Fischbach* Court stressed that a choice of policy which limits the exercise of a legislatively created right should be decided by the legislative branch of the government. That Court also stated that the only justification for the Court's limiting the exercise of a legislatively created right is under the doctrine of laches. Against all of this authority the *DelCostello* Court borrows an administrative statute of

limitations justifying this loan under the policy of rapid final resolution of labor disputes. However, the *DelCostello* Court implies that if there were a state statute of limitations which was more closely analogous to an employee's cause of action against the union for unfair representation compared to the six month statute adopted then the state statute would be chosen. Simply put, in derivation of past precedent, the *DelCostello* Court concluded that when a federal statute omits a statute of limitations the Court may choose any statute of limitations when the federal policies at stake and the practicalities of litigation make the chosen statute a significantly more appropriate vehicle for "interstitial lawmaking".

The Michigan state statute of limitations regarding a cause of action for legal malpractice is more closely analogous to an employee's cause of action against his union for unfair representation and does not defeat the policies underlying federal labor law.

Furthermore, the actual time limit intended in 29 USC § 160(b) was 12 months. This is evident from House Report No. 245 on HR 3020 pg. 40, which explains the practical implementation of said statute as follows:

> *"A more important change is one that requires charging parties to file their charges (with the administrator) within six months after the unfair practices alleged to have occurred and that requires the administrator to issue the complaint within six months after the charge is filed." (See attached Exhibit 8)*

With this statement it is clear that the legislature intended that a charging party have six months from the time the alleged unfair labor practice occurred to file his or her charge. In addition, it was intended that the administrator have six months from the time the charge is

filed to issue a complaint against the employer. This explanation of 29 USC § 160(b) would allow the filing of a complaint against an employer for an unfair labor practice to occur some 12 months after the unfair labor practice occurred.

III. THE SIX (6) MONTH STATUTE LOCATED AT 29 USC § 160(b) IS NOT CONTROLLING SINCE THE APPLICATION OF SAID STATUTE OF LIMITATIONS CLEARLY GOES AGAINST THE LEGISLATIVE HISTORY OF 29 USC § 160(b).

29 USC § 160(b) was amended to include a six (6) month statute of limitations in 1947. Said statute reads, in part, as follows:

> *"Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designed by the Board for such purposes, shall have power to issue and cause to be served upon such person a Complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five (5) days after the serving of said Complaint: provided, that no complaint shall issue based upon any unfair labor practice occurring more than six (6) months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made. . . . "*

In *Toibb v. Radloff*, 501 U.S. 157, 111 S. Ct. 2197, 115 L. Ed. 2d 145 (1991), the Court held that:

> *"Where . . . the resolution of a question of federal law turns on a statute and the intention of Congress, we look first to the statutory language and then to the legislative history if the statutory language is unclear."*

In the instant case, this Court is being asked to consider the legislative history and intent behind 29 USC § 160(b) since its language and the application of said language is ambiguous and unclear. In *DelCostello, supra,* the Court admits that 29 USC § 160(b) was not written expressly to apply to § 301 hybrid cases. In fact, the *DelCostello* Court adopted 29 USC § 160(b) as the statute of limitations in hybrid § 301 cases since it is the statute which most closely fits in such a situation. Impliedly, the *DelCostello* Court illustrates that 29 USC § 160(b) is ambiguous and unclear on its face because it is not expressly written to apply to hybrid § 301 actions. Since 29 USC § 160(b) is unclear and ambiguous, this Court should consider the legislative history and intent behind said statute as described below.

The six (6) month statute was proposed in an effort to improve administration of the government's laws on internal labor relations. At the same time the six (6) month statute of limitations was proposed, Congress created a new Labor Management Relations Board. It created an Administrator of the Board who would conduct the various prosecuting and investigative functions of the present Board. The Administrator's job would be to investigate cases and present evidence to the Board, and the Board could decide only upon the weight of credible legal evidence. House Report No. 245 on HR 3020 pg. 40 explained the practical implementation of the above discussed changes as follows:

> *"The Administrator, not the Board, receives from complaining party a charge of unfair labor practice. The Administrator promptly notifies the person or persons complained of that the charge has been filed. The administrator may investigate the charge by interrogating the complainant and by asking the person complained of for his version of the affair. If*

the Administrator has reasonable cause to believe that the charge is true, he issues a Complaint and has it served on the person complained of . . . a more important change is one that requires charging parties to file their charges (with the Administrator) within six (6) months after the unfair practices alleged to have occurred, and that requires the Administrator to issue the Complaint within six (6) months after the charge is filed."

From the legislative history of 29 USC § 160(b), it is apparent that Congress, when proposing these amendments in 1947, wanted to encourage an expeditious grievance process. Clearly, their intention was to require a charging party only to notify the *Administrator* of a dispute so the Administrator could investigate and decide whether or not to file a complaint within the prescribed time period. There is clearly no evidence of legislative intent to have this six (6) month requirement applied to a Plaintiff's cause of action in Federal Court against his employer and/or Union.

What's more, the complainant is not even the person who makes the decision to file the Complaint in this procedure. It was the Legislature's intent to allow the Board and/or the Administrator decide whether a Complaint should be filed. The only duty placed upon the complainant is that he notify the Board of his charge and who he is charging within six (6) months of the time of the incident. On its face, 29 USC § 160(b), doesn't even state that the Complaint, which is to be filed by the Board, is required to be filed within six (6) months of the time of the incident. It merely states that the Board can only file a Complaint if the charging party filed its charge with the Board within six (6) months of the incident. In fact, from statements made on the Congressional floor the

time period for filing an internal complaint was intended to be 12 months from the incident.

As is evident from the legislative history of 29 USC § 160(b) the Legislature did not intend for the six (6) month limitation to apply outside of the grievance process. The six (6) month limitation was added so that the Union and management would act quicker in processing claims. Furthermore, clearly it was not added to apply to employee claims against the Union after the grievance process has broken down.

CONCLUSION

In this case, the application of the limitation of actions was a factual question. Petitioner should not be denied the right to a jury fact finding on this issue.

Moreover, pursuant to legislative history, it is clear that 29 USC § 160(b) which contains the six month statute of limitations applied by the *DelCostello v. International Brotherhood of Teamsters* case, was clearly not written expressly to apply in such hybrid situations. Furthermore, the legislature did not intend that 29 USC § 160(b) and the six month statute of limitations apply outside the grievance process. For all the foregoing reasons, Petitioners respectfully request that a Writ of Certiorari issue to the Court of Appeals.

Respectfully submitted,

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Dated: May 21, 1996

NOT RECOMMENDED FOR PUBLICATION

No. 94-2115

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

THOMAS R. ZIMMER and SUZANNE K. ZIMMER, **Plaintiffs-Appellants,** v. AMERICAN TELEPHONE and TELEGRAPH COMPANY OF MICHIGAN, MICHIGAN BELL TELEPHONE COMPANY, and COMMUNICATIONS WORKERS OF AMERICA, NATIONAL and COMMUNICATIONS WORKERS OF AMERICA LOCAL 4009, **Defendants-Appellees.**	**ON APPEAL** FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN **MEMORANDUM OPINION** (Filed Feb. 21, 1996)

BEFORE: NORRIS and MOORE, Circuit Judges; MILES, District Judge.*

PER CURIAM. Plaintiffs, Thomas R. Zimmer and Suzanne K. Zimmer, appeal from the order of the district court dismissing their lawsuit which was premised upon the failure of Thomas Zimmer's employer to recall him to work, the alleged failure of his union to adequately represent his interests, and several state law claims.

Having had the benefit of oral argument and having carefully considered the record on appeal and the briefs

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*The Honorable Wendell A. Miles, District Judge for the Western District of Michigan, sitting by designation.

of the parties, we are not persuaded that the district court erred in dismissing the lawsuit.

Because the reasoning which supports judgment for defendants has been articulated by the district court, the issuance of a detailed written opinion by this court would be duplicative and serve no useful purpose. Accordingly, the judgment of the district court is **affirmed** upon the reasoning employed by that court in its memorandum and order dated August 30, 1994.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF MICHIGAN

THOMAS ZIMMER and
SUZANNE K. ZIMMER,

Plaintiffs,

v.

AMERICAN TELEPHONE AND TELEGRAPH COMPANY OF MICHIGAN, MICHIGAN BELL, COMMUNICATION WORKERS OF AMERICA, NATIONAL, and COMMUNICATIONS WORKERS OF AMERICA LOCAL 4009

Defendants.

JUDGMENT IN A CIVIL CASE

CASE NUMBER:
94-70909

___ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

XX **Decision by Court.** This action came to ~~trial or~~ hearing before the Court. The issues have been ~~tried or~~ heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED defendants' motions to dismiss or for summary judgment are GRANTED and the above case is DISMISSED.

I hereby certify that the foregoing is a true copy of the original on file in this Office.

CLERK U.S. DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN

By /s/ Judy Cassady
Deputy

August 30, 1994 — JOHN P. MAYER
Date — *Clerk*

/s/ Judy Cassady
(By) Deputy Clerk
JUDY CASSADY

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

THOMAS R. ZIMMER, and SUZANNE K. ZIMMER,

Plaintiffs,

v.

AMERICAN TELEPHONE AND TELEGRAPH COMPANY OF MICHIGAN, a Michigan Corporation, MICHIGAN BELL TELEPHONE COMPANY, a Michigan Corporation, and COMMUNICATIONS WORKERS OF AMERICA, NATIONAL, and COMMUNICATIONS WORKERS OF AMERICA LOCAL 4009,

Defendants.
_____/

Civil No. 94-70909
Honorable Avern Cohn

MEMORANDUM AND ORDER

I.

This is an action against Thomas Zimmer's (Zimmer) employer and union based on the employer's failure to recall Zimmer after a reduction in workforce and the union's alleged failure adequately to represent Zimmer. Plaintiffs, Zimmer and his wife, Suzanne Zimmer, filed this action on February 1, 1994, asserting twelve state law claims against Zimmer's employers, American Telephone

and Telegraph (AT&T)[1] and Michigan Bell Telephone Company (Michigan Bell) (collectively, the employers), and against Zimmer's union, Communications Workers of America, National, and Communication Workers of America Local 4009 (collectively, the Union). Now before the Court are motions to dismiss or for summary judgment brought by the Union, AT&T, and Michigan Bell. For the reasons that follow, the motions will be granted and the case will be dismissed.

II.

Zimmer was hired by Michigan Bell as an hourly employee in June, 1973, and worked for Michigan Bell until 1983. As a consequence of the reorganization of the Bell Operating System (the divestiture order) in 1983, Zimmer was given the choice of working for AT&T or Michigan Bell, and elected to work for AT&T. Throughout the course of his employment with Michigan Bell and AT&T, Zimmer was a member of the Union.

Zimmer worked for AT&T until September, 1989, when he was laid off as part of a work-force reduction. Under the divestiture order, Zimmer had recall rights from both AT&T and Michigan Bell. Under the collective bargaining agreement between AT&T and the Union, Zimmer could be recalled on a seniority basis for three

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[1] The complaint erroneously names American Telephone and Telegraph Company of Michigan as Zimmer's employer; the actual employer was American Telephone and Telegraph, a New York corporation. Plaintiffs intend to amend the complaint to add AT&T as a defendant.

years from the time of his layoff. Under the collective bargaining agreement between the Union and Michigan Bell, Zimmer could be recalled on a seniority basis for two years from the time of his layoff.[2]

In order to be recalled to either AT&T or Michigan Bell, Zimmer had to complete a recall interest form and return it to AT&T. Upon his termination from AT&T, Zimmer was given a "termination packet" that included a recall interest form. Zimmer claims to have completed and submitted the forms in termination packet, but AT&T has no record of ever receiving a recall interest form from Zimmer. Michigan Bell did not give Zimmer a separate termination packet.

In September, 1991, Zimmer discovered that other former employees with less seniority than he had been recalled by Michigan Bell, although he had not. Zimmer was later informed in a letter from Michigan Bell dated June 29, 1992,[3] that he was not included on Michigan Bell's recall list because he had not completed and forwarded the recall interest form included in his termination packet from AT&T.

After learning that other less senior employees had been recalled by Michigan Bell, Zimmer visited Domonic Guadigni (Guadigni), the president of his local union chapter. Guadigni called Michigan Bell on Zimmer's behalf during this visit. In February, 1993, Zimmer requested that the Union file a grievance on his behalf.

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[2] The record does not contain copies of the collective bargaining agreements.

[3] The record does not contain a copy of this letter.

The Union investigated Zimmer's claim and decided not to pursue it. On June 23, 1993, a Union representative wrote Zimmer a letter saying that the Union had investigated his complaint and found that AT&T had no record of Zimmer's ever completing a recall interest form, and concluding that "there is nothing else the Communication Workers of America can do on your behalf." The letter was sent via certified mail, and Zimmer signed for and received the letter on June 25, 1993. The Union never filed a grievance.

On July 28, 1993, Zimmer sent a letter by certified mail to the Union representative, requesting information regarding the status of a "grieivance [he] had filed with [the Union] just prior to [his] termination," and information regarding other AT&T employees laid off in 1989. The Union never responded to Zimmer's letter.

Zimmer and his wife, Suzanne Zimmer, filed this action of February 1, 1994, in Wayne County Circuit Court. The case was removed to this Court on March 9, 1994, on the basis of federal question jurisdiction under § 301 of the Labor-Management Relations Act of 1947 (LMRA), 29 U.S.C. § 185; 28 U.S.C. § 1331.

III.

The complaint alleges twelve counts, all premised on state law rather than the LMRA:

I Breach of duty to exercise reasonable care in the processing of Zimmer's termination packet by AT&T.

II Breach of duty to exercise reasonable care in the processing of Zimmer's termination packet by Michigan Bell.

III Breach of duty to exercise reasonable care in overseeing the processing of Zimmer's termination packet by the Union.

IV Breach of an employment contract between Zimmer and AT&T premised on AT&T's failure to recall Zimmer.

V Breach of an employment contract between Zimmer and Michigan Bell premised on Michigan Bell's failure to recall Zimmer.

VI Breach of Zimmer's "employment contract which incorporated the terms of the collective bargaining agreement between [the Union] and AT&T and Michigan Bell" by the Union in failing to oversee the processing of Zimmer's recall interest form and failing fairly to represent Zimmer in the dispute over his recall.[4]

VII Intentional infliction of emotional distress against AT&T.

VIII Intentional infliction of emotion distress against Michigan Bell.

IX Intentional infliction of emotional distress against the Union.

X Loss of consortium against AT&T.

XI Loss of consortium against Michigan Bell.

XII Loss of consortium against the Union.

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[4] This Count is erroneously numbered "IV" in the complaint.

IV.

Each defendant has filed its own motion to dismiss or for summary judgment. The gist of all three motions is the same: that plaintiffs' claims are all preempted by § 301 of the LMRA (§ 301), 29 U.S.C. § 185, because they necessarily implicate the terms of the collective bargaining agreements between the Union and AT&T and between the union and Michigan Bell, and that plaintiffs did not meet the six-month statute of limitations for bringing a claim under § 301. Zimmer responds that his claims sound in common law negligence and breach of contract and are based on the defendants' breach of a "duty of reasonable care in securing and maintaining" Zimmer's recall interest form. Zimmer says the defendants breached that duty by losing his recall interest form, and that his claims relating to that breach of duty do not require an interpretation of the terms of the collective bargaining agreements and therefore are not preempted by the LMRA. Alternatively, he argues, even if the claims are preempted by the LMRA, the six month statute of limitations has not yet run, because he continued to pursue internal union remedies until August 30, 1993, "when he began seeking relief in the court systems."

A.

Each of the defendants argues that the counts against it are preempted by the LMRA. Section 301 of the LMRA, 29 U.S.C. § 185, states that:

> (a) Suits for violation of contract between an employer and a labor organization representing employees in an industry affecting commerce . . . may be brought in any district court of the United States having jurisdiction of the parties.

The Supreme Court has interpreted this language to require federal preemption of state law-based actions when resolution of the state law claim depends on the meaning of a collective bargaining agreement, *Teamsters v. Lucas Flour Co.*, 369 U.S. 95, 103-104 (1962), or "is inextricably intertwined with consideration of the terms of the labor contract." *Allis-Chalmers v. Lueck*, 471 U.S. 202, 213 (1985). Any state law claim will be preempted by § 301 if the claim is "substantially dependent on analysis of a collective bargaining agreement." *Adkins v. General Motors Corp.*, 946 F.2d 1201, 1205 (6th Cir. 1991) (quoting *Electrical Workers v. Hechler*, 481 U.S. 851, 859 n. 3 (1987)). Labor contract disputes are therefore preempted by § 301,

> whether such questions arise in the context of a suit for breach of contract or in a suit alleging liability in tort. Any other result would elevate form over substance and allow parties to evade the requirements of § 301 by relabeling their contract claims as claims for tortious breach of contract.

Id. at 211. The preemptive force of § 301 is extremely broad:

> [T]he preemptive force of § 301 is so powerful as to displace entirely any state cause of action "for violation of contracts between an employer and a labor organization." Any such suit is purely a creature of federal law, notwithstanding the fact

> that state law would provide a cause of action in the absence of § 301.

Franchise Tax Board v. Laborers Vacation Trust, 463 U.S. 1, 23 (1983).

B.

Counts I and II charge that AT&T and Michigan Bell negligently, intentionally, or recklessly failed properly to process Zimmer's recall interest form, and failed to take steps to remedy the mistake after it was brought to their attention. Count III charges that the Union negligently, intentionally, or recklessly failed to oversee the processing of the recall interest form, and failed to take steps to remedy the problem regarding the form after being notified that the form had been misplaced. These three counts are styled as tort claims, alleging breach of a duty of care concerning the processing of Zimmer's recall interest form.

Plaintiffs argue that the first three counts are not preempted by § 301 because "[t]he Collective Bargaining Agreement does not address whether or not defendant is required to exercise reasonable care in maintaining such a form." Counts I and II specifically allege that the employers were under a duty pursuant to a collective bargaining agreement with the Union to present Zimmer with "a complete termination packet," included in which was the recall interest form serving as the basis for Zimmer's claims. Count III similarly alleges that "pursuant to a collective bargaining agreement" the Union had a duty to "assure a complete termination packet was presented to" Zimmer.

A determination of whether the parties indeed were under the duties described in the Counts I, II, and III and the scope of those duties "is substantially dependent upon analysis of the terms of an agreement between the parties in a labor contract," *Allis-Chalmers*, 471 U.S. at 220. Plaintiffs attempt to fashion these counts into a common law claim, but there would be no duties at all regarding the recall interest form if the collective bargaining agreements did not in fact mandate that AT&T and Michigan Bell supply Zimmer with such a form and then process the form, and that the Union supervise the processing of the form. Plaintiffs cite no common law authority that would create such duties apart from the collective bargaining agreements, and the Court is not aware of any. Counts I, II, and III are therefore preempted by § 301 of the LMRA "because the underlying dut[ies] arise[] directly from" the collective bargaining agreements. *Fox v. Parker Hannifin Corp.*, 914 F.2d 795, 801 (6th Cir. 1990).

C.

Counts IV, V, and VI are styled as breach of individual employment contract claims. Counts IV and V allege that "pursuant to an employment contract between [the employers] and Plaintiff which incorporated the terms of the collective bargaining agreement between [the employers] and [the Union], the employers were under the duty to present Zimmer with a complete termination packet upon his termination, and properly to process the recall interest form from the termination packet. Count VI alleges that "pursuant to Plaintiff's employment contract which incorporated the terms of the collective bargaining agreement between [the Union] and [the employers]," the

Union was under contractual duties to insure that the employers presented Zimmer with a complete termination packet and to oversee the processing of Zimmer's recall interest form and Zimmer's recall based on seniority.

Plaintiffs argue that these counts are "based on separate and distinct" contracts between the employers and Zimmer, creating rights and duties "separate from those created under the Collective Bargaining Agreement."[5] Plaintiffs papers are vague on this point, and never explain how Zimmer allegedly came to enter into individual contracts with his employers while he was covered by a collective bargaining agreement. Although plaintiffs repeatedly assert that the rights created by the "separate and distinct" contracts between the employers and Zimmer are "different" from arising out of the collective bargaining agreement, plaintiffs never articulate what the "different" rights are, or how they differ from those arising under the collective bargaining agreement.

Despite plaintiffs' assertion that Zimmer entered "separate and distinct" contracts with the employers, by the allegations in his own complaint the separate contracts "incorporated the terms of the collective bargaining agreement." Thus, even if Zimmer did enter into individual contracts with the employers, the claims based on

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[5] The record does not contain copies of the "separate and distinct" employment contracts, or the collective bargaining agreement. It is also unclear from the current state of the record if there is one collective bargaining agreement between the Union and the employers or two separate collective bargaining agreements.

those contracts "rely upon the collective agreement indirectly," and "address the relationship between the individual contracts and the collective agreement." *Caterpillar Inc. v. Williams*, 482 U.S. 386, 395 (1987).[6] Such claims, which are "inextricably intertwined with consideration of the terms of the labor contract[s]" between the Union and the employers, are preempted by § 301.[7]

D.

In Counts VII, VIII, and IX, plaintiffs allege that the defendants engaged in "outrageous conduct" with regard to Zimmer, and that the outrageous conduct caused "serious and sever[e]" emotional distress. Specifically, plaintiffs allege that the employers' failure properly to

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[6] It is unlikely that plaintiffs could establish that Zimmer had rights under individual employment contracts with his employers because he was covered by the collective bargaining agreements while working for the employers. The Sixth Circuit has held that "employees covered by a CBA [collective bargaining agreement] cannot rely upon the existence of a separate, individual employment giving rise to state law claims." *Fox*, 914 F.2d at 801.

[7] Count VI, against the Union, alleges acts on the part of the Union that purportedly breached of [sic] Zimmer's separate contracts with the employers, such as "failing to pursue a grievance against AT&T and Michigan Bell," which in substance constitute a claim that the Union breached its duty of fair representation of Zimmer. The Sixth Circuit has held that "an action for the breach of the duty of fair representation that directly implicates the grievance provisions of a collective bargaining agreement 'clearly falls within the ambit of section 301 preemption.' " *In re Glass Workers, Local No. 173*, 983 F.2d 725, 728 (6th Cir. 1993).

process Zimmer's recall interest form and to recall Zimmer "pursuant to an employment agreement and collective bargaining agreement" entitles plaintiffs to recover damages for intentional infliction of emotional distress from the employers. Plaintiffs also allege that the Union's failure properly to represent Zimmer concerning the recall interest form and "to assure the recall of [Zimmer] pursuant to an employment agreement and collective bargaining agreement" constituted outrageous conduct entitling plaintiffs to recover damages for intentional infliction of emotion [sic] distress from the Union.

Under Michigan law, damages for the intentional infliction of emotional distress can only be recovered if:

> the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in civilized society.

Meek v. Michigan Bell Tel. Co., 193 Mich. App. 340, 346 (1991) (citations omitted). It is doubtful that a failure properly to process or oversee the processing of a recall interest form, or to recall or supervise the recall of an employee under the terms of a collective bargaining agreement, would often meet the Michigan standard for recovery of damages for intentional infliction of emotional distress.

Here, it is clear that any duty to process a recall interest form, or to supervise the process of such a form arose, if at all, pursuant to a collective bargaining agreement. Absent such a duty, improper processing of the form could not conceivably form the basis of a claim for

intentional infliction of emotional distress. And the complaint specifies that the duty to recall arose under "an employment agreement and *collective bargaining agreement*" (emphasis added). Thus Counts VII, VIII, and IX, like those before them, unavoidably involve reference to the terms of the collective bargaining agreements, and therefore are preempted by § 301.

E.

Counts X, XI, and XII are claims for loss of consortium. Under Michigan law, recovery on a claim for loss of consortium is contingent on the injured spouse's recovery of damages for the alleged underlying injury. *Berryman v. K Mart Corp.*, 193 Mich. App. 88, 94 (1992). Because Counts I through IX are preempted by § 301 and will be dismissed, neither plaintiff will recover damages for the underlying claims and therefore neither plaintiff can maintain an action for loss of consortium.

F.

An action asserting claims against an employer for breach of a collective bargaining agreement and against a union for breach of the duty of fair representation is known as a hybrid § 301/fair representation action. Under *DelCostello v. Intn'l Brotherhood of Teamsters*, 462 U.S. 151, 169 (1983), the statute of limitations for a hybrid § 301/fair representation claim is the six month period established in §10(b) of the LMRA, 29 U.S.C. § 160(b). Because plaintiffs' state law claims (other than the loss of consortium claims) are preempted by § 301 and are in

substance a hybrid § 301/fair representation claim, the six month period of limitations applies here.

The parties disagree as to how the six month period of limitations should be applied here. The period begins to run when the plaintiff "discovers, or in the exercise of reasonable diligence should have discovered, the acts constituting the alleged violation." *Adkins v. Intn'l Union of Elec., Radio, and Machine Workers*, 769 F.2d 330, 335 (6th Cir. 1985). A union's alerting a plaintiff that it will not pursue a grievance provides plaintiff with knowledge of acts constituting the alleged unfair representation violation, and thus triggers the period of limitations. *Jones v. General Motors Corp.*, 939 F.2d 380, 384 (6th Cir. 1991).

Defendants all argue that the statute of limitations began to run when Zimmer received the letter from the Union stating that "[t]here is nothing else the [Union] can do for you." The letter was dated June 23, 1993, and sent via certified mail. Zimmer signed for and received the letter on June 25, 1993.

Plaintiffs argue that the letter did not trigger the period of limitations because it did not unequivocally state that further internal appeals were futile, and because it was written by a union representative whose authority was questionable. Plaintiffs say that Zimmer continued in good faith to pursue internal union remedies until August 30, 1993, and that the statute should not begin to run until that date. Alternatively, plaintiffs argue that because they seek equitable relief – "reinstatement and seniority rights" – the statute of limitations should not apply to their action.

While the June 23, 1993, letter is not as explicit as it might be, it should have served to alert Zimmer that the Union did not intend to pursue his grievance. The June 23, 1993, letter specifically refers to a letter Zimmer had written to his union representative dated May 27, 1993. In the May 27, 1993, letter, Zimmer asked "[w]ill the [Union] file a grievance against AT&T and Michigan Bell on my behalf, followed by arbitration if necessary?" The response of the Union representative in the June 23, 1993, letter was "[t]here is nothing else the [Union] can do on your behalf." The Union's response, read in conjunction with Zimmer's letter of May 27, 1993, indicates that the Union did not intend to pursue Zimmer's case, and, specifically, was not going to file a grievance on Zimmer's behalf.

The only evidence offered by plaintiffs to the effect that Zimmer continued to pursue internal union remedies after receiving the June 23, 1993, letter is a letter Zimmer wrote to his union representative on July 28, 1993. The July 28, 1993, letter requested information regarding employees laid off and recalled by Michigan Bell, and "all documentation concerning a grievance [he] had filed with the [Union] just prior to [his] termination." On its face, it is not at all clear that the grievance referred to in the July 28 letter concerns the subject matter of this suit. The letter refers to a grievance filed *prior* to Zimmer's termination; the actions complained of here, concerning Zimmer's recall and the processing of his recall interest form necessarily took place *after* his termination and could not possibly be the subject of a grievance filed prior to termination.

Furthermore, the Union points out that Zimmer never invoked the Union's internal appeals procedure. The Union's Constitution sets out the procedures for the internal appeals process. The Union Constitution states that:

> [t]he purpose of these appeal procedures is to provide reasonable regulations for the consideration and review of complaints of members regarding actions of the Union or Local, or Union or Local Officers or governing bodies, which are alleged to be in violation of the Union Constitution, Local Bylaws, rights and privileges of members.

Under these procedures, a Union member may make a complaint against the Union by filed [sic] a written complaint with the President of the Union within sixty days of the time the member became aware of the alleged violation. CWA Constitution, April 1992, Internal Appeals, § II.A.

Here, if Zimmer wished to challenge the Union's decision not to represent in a grievance regarding the subject matter of this suit, he should have filed a written complaint with the president of the Union within sixty days of his receipt of the June 23 letter stating that "[t]here is nothing else the [Union] can do for you." Zimmer has not submitted any evidence that he filed such a complaint, and the president of the Union, Morton Bahr (Bahr), says in his affidavit that Union records indicate that Zimmer never filed a complaint challenging the decision not to pursue his claim.

Zimmer claims in his brief opposing the Union's motion to dismiss or for summary judgment that sometime after writing his letter of July 28, 1993, and before August 30, 1993, he attempted to contact Bahr and his union representative by telephone to request arbitration of his dispute. The record contains no documentation of any such telephone calls. Even if Zimmer did attempt to make the telephone calls, the attempt would not comply with the Union procedures for internal appeals. Simply placing telephone calls or making other contacts with Union officials, such as Zimmer's letter of July 28, 1993, while ignoring the Union's appeals procedures, will not serve to toll the statute of limitations. "Otherwise, a plaintiff could indefinitely delay resolution of labor disputes merely by bombarding his union with tiresome requests for needless review." *Dozier v. Trans World Airlines, Inc.*, 760 F.2d 849, 852 (7th Cir.1 1985).

Because Zimmer did not pursue the internal appeal process outlined in the Union Constitution after receiving the June 23, 1993, letter, the six month period of limitations was triggered by the letter, which informed Zimmer that the Union would not pursue his claim. Because Zimmer did not file this action until February 1, 1994, it is barred by the six month period of limitations for a hybrid § 301/fair representation claim.[8]

Plaintiffs finally argue that the six month period of limitations for a hybrid § 301/fair representation claim should not be applied here because they seek "equitable

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[8] A hybrid § 301/fair representation claim must fail against the employer if it fails against the union. *See DelCostello*, 462 U.S. at 165.

relief": reinstatement and seniority rights. In support of this argument, plaintiffs offer the truism that "equity eschews mechanical rules." *Galliher v. Cadwell*, 145 U.S. 368, 373 (1892), and cites cases to the effect that:

> from the beginning, equity, in the absence of any statute of limitations made applicable to equity suits, has provided its own rule of limitations through the doctrine of laches.

Russell v. Todd, 309 U.S. 280, 287 (1940).

The instant case does not present an equity suit to which no statute of limitations has been made applicable. The Supreme Court, in *DelCostello*, explicitly held that the six month period of limitations from § 10(b) of the LMRA, 29 U.S.C. 160(b). *Del Costello*, 462 U.S. at 169. That plaintiffs seek injunctive relief in addition to monetary damages does not transform their claim into a suit at equity to which no statute of limitations applies. The LMRA clearly contemplates the granting of injunctive relief and the sixth month period of limitations it provides was designed with the possibility of injunctive relief in mind. Plaintiffs have not demonstrated any reason why the sixth month period of limitation should not apply here.[9]

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[9] Plaintiffs assert that AT&T "fraudulently concealed the fact that [Zimmer's] recall interest form was not contained in his personal [sic] file." Plaintiffs admit, though, that Zimmer received a copy of his file in 1992, well before the period of limitations began to run on June 25, 1993.

V.

For the reasons stated, the motions of AT&T, Michigan Bell, and the Union are GRANTED, and the case is DISMISSED.

SO ORDERED.

/s/ Avern Cohn
AVERN COHN
UNITED STATES DISTRICT JUDGE

DATED: AUG 30 1994
Detroit, Michigan

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

THOMAS R. ZIMMER, and
SUZANNE K. ZIMMER,

Plaintiffs,

v.

AMERICAN TELEPHONE AND TELEGRAPH COMPANY OF MICHIGAN, a Michigan Corporation, MICHIGAN BELL TELEPHONE COMPANY, a Michigan Corporation, and COMMUNICATIONS WORKERS OF AMERICA, NATIONAL, and COMMUNICATIONS WORKERS OF AMERICA LOCAL 4009,

Defendants.
_____/

Civil No. 94-70909
Honorable
Avern Cohn

ERRATUM

The Court's Memorandum and Order of August 30, 1994, contained an error. The second sentence of the first full paragraph on page 17 reads: "The Supreme court, in *DelCostello*, explicitly held that the six month period of limitation from § 10(b) of the LMRA, 29 U.S.C. § 160(b)." It should read: "The Supreme Court, in *DelCostello*, explicitly held that the six month period of limitation

from § 10(b) of the LMRA, 29 U.S.C. § 160(b), applies to hybrid § 301/fair representation claims."

/s/ Avern Cohn
AVERN COHN
UNITED STATES DISTRICT JUDGE

DATED: SEP 06 1994
Detroit, Michigan

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

THOMAS R. ZIMMER and
SUZANNE K. ZIMMER,

Plaintiffs,

v. Civil No. 94-70909

AMERICAN TELEPHONE AND TELEGRAPH COMPANY OF MICHIGAN, a Michigan corporation, MICHIGAN BELL TELEPHONE COMPANY, a Michigan corporation, and COMMUNICATIONS WORKERS OF AMERICA, NATIONAL AND COMMUNICATIONS WORKERS OF AMERICA LOCAL 4009,

Defendants.
_____/

ORDER

Plaintiffs have moved for rehearing of the judgment dismissing this case entered August 30, 1994 for the reasons stated in the Memorandum And Order of the same date. The motion is DENIED. Clearly plaintiff's legitimate claims were subject to a six month statute of limitation which they failed to meet.

SO ORDERED.

/s/ Avern Cohn
AVERN COHN
UNITED STATES DISTRICT JUDGE

DATED: SEP 16 1994
Detroit, Michigan

DelCOSTELLO *v.* INTERNATIONAL BROTHERHOOD OF TEAMSTERS ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 81-2386. Argued April 25, 1983 – Decided June 8, 1983*

The issue in each of these cases is what statute of limitations applies in an employee suit against an employer and a union, alleging the employer's breach of a collective-bargaining agreement and the union's breach of its duty of fair representation by mishandling the ensuing grievance or arbitration proceedings. *United Parcel Service, Inc. v. Mitchell*, 451 U. S. 56, held in a similar suit that an employee's claim against the employer was governed by a state statute of limitations for vacation of an arbitration award rather than by a state statute for an action for breach of contract, but left open the issues as to what state statute should govern the employee's claim against the union or whether, instead of applying a state statute of limitations, the provisions of § 10(b) of the National Labor Relations Act establishing a 6-month limitations period for making charges of unfair labor practices to the National Labor Relations Board should be borrowed. In No. 81-2386, respondent local union brought a formal grievance under the collective-bargaining agreement based on petitioner employee's alleged improper discharge. After a hearing, a joint union-management committee informed petitioner of its conclusion that

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* Together, with No. 81-2408, *United Steelworkers of America, AFL-CIO-CLC, et al. v. Flowers et al.*, en [sic] certiorari to the United States Court of Appeals for the Second Circuit.

the grievance was without merit, and the committee's determination became final on September 20, 1977. On March 16, 1978, petitioner filed suit in Federal District Court, alleging that the employer had discharged him in violation of the collective-bargaining agreement, and that the union had represented him in the grievance procedure in a discriminatory, arbitrary, and perfunctory manner. The District Court ultimately granted summary judgment against petitioner, concluding that Mitchell compelled application of Maryland's 30-day statute of limitations for actions to vacate arbitration awards to both of petitioner's claims. The Court of Appeals affirmed. In No. 81-2408, petitioner local union invoked arbitration after it was unsuccessful in processing respondent employees' grievances based on the employer's alleged violations of the bargaining agreement arising from job-assignment practices. On February 24, 1978, the arbitrator issued an award upholding the employer's job assignments, and on January 19, 1979, respondents filed suit in Federal District Court, alleging that the employer had violated the bargaining agreement, and that the union had violated its duty of fair representation in handling respondents' claims. The District Court, applying New York's 90-day statute of limitations for actions to vacate arbitration awards, dismissed the complaint against both the employer and the union. Ultimately, the Court of Appeals, acting in light of the intervening decision in *Mitchell*, rejected the contention that § 10(b) should be applied; affirmed the dismissal as to the employer under the 90-day arbitration statute; but reversed as to the union,

concluding that New York's 3-year statute for malpractice actions governed.

Held:

1. In this type of suit, the 6-month limitations period in § 10(b) governs claims against both the employer and the union. Pp. 158-172.

(a) When, as here, there is no federal statute of limitations expressly applicable to a federal cause of action, it is generally concluded that Congress intended that the courts apply the most closely analogous statute of limitations under state law. However, when adoption of state statutes would be at odds with the purpose or operation of federal substantive law, timeliness rules have been drawn from federal law – either express limitations periods from related federal statutes, or such alternatives as laches. *Auto Workers v. Hoosier Cardinal Corp.*, 383 U. S. 696, distinguished. Pp. 158-163.

(b) An employee's suit against both the employer and the union, such as is involved here, has no close analogy in ordinary state law, and the analogies suggested in *Mitchell* suffer from flaws of both legal substance and practical application. Typically short state limitations periods for vacating arbitration awards fail to provide the aggrieved employee with a satisfactory opportunity to vindicate his rights, and analogy to an action to vacate an arbitration award is problematic at best as applied to the employee's claim against the union. While a state limitations period for legal malpractice is the closest state-law analogy for the claim against the union, application of such a limitations period would not solve the problem

caused by the too-short time in which the employee could sue the employer, and would preclude the relatively rapid resolution of labor disputes favored by federal law. In contrast, § 10(b)'s 6-month period for filing unfair labor practice charges is designed to accommodate a balance of interests very similar to that at stake here. Both the union's breach of its duty and the employer's breach of the bargaining agreement are often also unfair labor practices. Moreover, in § 10(b) "Congress established a limitations period attuned to what it viewed as the proper balance between the national interests in stable bargaining relationships and finality of private settlements, and an employee's interest in setting aside what he views as an unjust settlement under the collective-bargaining system." *Mitchell, supra,* at 70-71 (Stewart, J., concurring in judgment). Pp. 163-172.

2. The judgment in No. 81-2408 is reversed because it is conceded that the suit was filed more than 10 months after respondents' causes of action accrued. However, in No. 81-2386 the judgment is reversed but the case is remanded since petitioner contends that certain events tolled the running of the limitations period until about three months before he filed suit, but the District Court, applying a 30-day limitations period, declined to consider any tolling issue. P. 172.

679 F.2d 879, reversed and remanded; 671 F.2d 87, reversed.

BRENNAN, J., delivered the opinion of the Court, in which BURGER, C.J., and WHITE, MARSHALL, BLACKMUN, POWELL, and REHNQUIST, JJ., joined. STEVENS, J., *post*, p. 172, and O'CONNOR, J., *post*, p. 174, filed dissenting opinions.

William H. Zinman argued the cause for petitioner in No. 81-2386. With him on the briefs was *Paul A. Levy*. *Robert M. Weinberg* argued the cause for petitioners in No. 81-2408. With him on the briefs were *Michael H. Gottesman*, *Bernard Kleiman*, *Carl Frankel*, and *Laurence Gold*.

Bernard S. Goldfarb argued the cause for respondents in No. 81-2386 and filed a brief for respondent Anchor Motor Freight, Inc. *Isaac N. Groner*, by appointment of the Court, 459 U. S. 1143, argued the cause and filed a brief for respondents in No. 81-2408. *Carl S. Yaller* and *Bernard W. Rubenstein* filed a brief for respondent Local 557, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America in No. 81-2386.*

JUSTICE BRENNAN delivered the opinion of the Court.

Each of these cases arose as a suit by an employee or employees against an employer and a union, alleging that

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* *Steven C. Kahn* and *Stephen A. Bokat* filed a brief for the Chamber of Commerce of the United States as *amicus curiae* urging reversal in both cases. *Alan B. Morrison* filed a brief for Teamsters for a Democratic Union as *amicus curiae* urging reversal in No. 81-2386.

David Previant, *Robert M. Baptiste*, and *Roland P. Wilder, Jr.*, filed a brief for the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America as *amicus curiae* urging affirmance in No. 81-2386.

Michael L. Boylan and *Teddy B. Gordon* filed a brief for Gordon L. Higgins as *amicus curiae* in No. 81-2408.

the employer had breached a provision of a collective bargaining agreement, and that the union had breached its duty of fair representation by mishandling the ensuing grievance-and-arbitration proceedings. See *infra*, at 162; *Bowen v. USPS*, 459 U. S. 212 (1983); *Vaca v. Sipes*, 386 U. S. 171 (1967); *Hines v. Anchor Motor Freight, Inc.*, 424 U. S. 554 (1976). The issue presented is what statute of limitations should apply to such suits. In *United Parcel Service, Inc. v. Mitchell*, 451 U. S. 56 (1981), we held that a similar suit was governed by a state statute of limitations for vacation of an arbitration award, rather than by a state statute for an action on a contract. We left two points open, however. First, our holding was limited to the employee's claim against the employer; we did not address what state statute should govern the claim against the union.[1] Second, we expressly limited our consideration to a choice between two *state* statutes of limitations; we did not address the contention that we should instead borrow a *federal* statute of limitations, namely, § 10(b) of the National Labor Relations Act, 29 U. S. C. § 160(b).[2] These cases present these two issues. We

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[1] Only the employer sought certiorari in *Mitchell*. Hence, the case did not present the question of what limitations period should be applied to the employee's claim against the union. See 451 U. S., at 60, *id.*, at 71-75 and n. 1 (STEVENS, J., concurring in part and dissenting in part).

[2] 49 Stat. 453. That section provides in pertinent part:

"*Provided* . . . no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made. . . ."

The petition for certiorari in *Mitchell* presented only the question of which *state* statute of limitations should apply. The

conclude that § 10(b) should be the applicable statute of limitations governing the suit, both against the employer and against the union.

I

A

Philip DelCostello, petitioner in No. 81-2386, was employed as a driver by respondent Anchor Motor Freight, Inc. and represented by respondent Teamsters Local 557. On June 27, 1977, he quit or was discharged[3] after refusing to drive a tractor-trailer that he contended was unsafe. He took his complaint to the union, which made unsuccessful informal attempts to get DelCostello reinstated and then brought a formal grievance under the collective-bargaining agreement. A hearing was held before a regional joint union-management committee. The committee concluded that the grievance was without

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parties did not contend in this Court or below that a federal limitations period should be used instead of analogous state law. Only an *amicus* suggested that it would be more appropriate to use § 10(b); moreover, application of § 10(b) rather than the state arbitration statute of limitations would not have changed the outcome of the case. Hence, we declined to address the issue. 451 U. S., at 60, n. 2.

Justice Stewart, concurring in the judgment, would have reached the issue and would have applied § 10(b) rather than any state limitations period. *Id.*, at 65-71. See also *id.*, at 64-65 (BLACKMUN, J., concurring); but see *id.*, at 75-76, and nn. 8-9 (STEVENS, J., concurring in part and dissenting in part).

[3] The employer contends that DelCostello's refusal to perform his work assignment was a "voluntary quit"; DelCostello contends that he was wrongfully discharged. The joint grievance committee upheld the employer's view.

merit. DelCostello was informed of that decision in a letter dated August 19, 1977, forwarding the minutes of the hearing and stating that the minutes would be presented for approval at the committee's meeting on September 20. DelCostello responded in a letter, but the minutes were approved without change. Under the collective-bargaining agreement, the committee's decision is final and binding on all parties.

On March 16, 1978, DelCostello filed this suit in the District of Maryland against the employer and the union. He alleged that the employer had discharged him in violation of the collective-bargaining agreement, and that the union had represented him in the grievance procedure "in a discriminatory, arbitrary and perfunctory manner," App. in No. 81-2386, p. 19, resulting in an unfavorable decision by the joint committee. Respondents asserted that the suit was barred by Maryland's 30-day statute of limitations for actions to vacate arbitration awards.[4] The District Court disagreed, holding that the applicable statute was the three-year state statute for actions on contracts.[5] 510 F. Supp. 716 (1981). On reconsideration following our decision in *Mitchell*, however, the Court granted summary judgment for respondents, concluding that *Mitchell* compelled application of the 30-day statute to both the claim against the employer and the claim against the union. 524 F. Supp. 721 (1981).[6] The

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[4] Md. Cts. & Jud. Proc. Code Ann. § 3-224 (1980).

[5] § 5-101.

[6] Respondents argue that DelCostello did not raise the argument below that the applicable limitations period is the six-month period of § 10(b). He did raise the § 10(b) point

Court of Appeals affirmed on the basis of the District Court's order. 679 F. 2d 879 (CA4 1982) (mem.).

B

Donald C. Flowers and King E. Jones, respondents in No. 81-2408, were employed as craft welders by Bethlehem Steel Corp. and represented by petitioner Steelworkers Local 2602.[7] In 1975 and 1976 respondents filed several grievances asserting that the employer had violated the collective-bargaining agreement by assigning certain welding duties to employees in other job categories and departments of the plant, with the result that respondents were laid off or assigned to noncraft work. The union processed the grievances through the contractually established procedure and, failing to gain satisfaction, invoked arbitration. On February 24, 1978, the arbitrator issued an award for the employer, ruling that the employer's job assignments were permitted by the collective-bargaining agreement.

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perfunctorily in opposition to respondents' motion for reconsideration, however, App. in No. 81-2186, p. 264, and he briefed it more thoroughly in the Court of Appeals, *id.*, at 282-290. Respondents likewise addressed the § 10(b) issue fully on the merits in the Court of Appeals; they did not raise any contention that DelCostello had waived the assertion. Brief for Appellees in No. 81-2086 (CA4), pp. 41-45.

[7] The other petitioner is the United Steelworkers of America, with which the Local is affiliated. The two labor organizations will be treated as one party for purposes of this case. Bethlehem Steel Corp. was a defendant below but is not before this Court in the present proceeding.

Respondents filed this suit in the Western District of New York on January 9, 1979, naming both the employer and the union as defendants. The complaint alleged that the company's work assignments violated the collective-bargaining agreement, and that the union's "preparation, investigation and handling" of respondents' grievances were "so inept and careless as to be arbitrary and capricious," in violation of the union's duty of fair representation. App. in No. 81-2408, p. 10. The District Court dismissed the complaint against both defendants, holding that the entire suit was governed by New York's 90-day statute of limitations for actions to vacate arbitration awards.[8] The Court of Appeals reversed on the basis of its prior holding in *Mitchell v. United Parcel Service, Inc.*, 624 F. 2d 394 (CA2 1980), that such actions are governed by New York's six-year statute for actions on contracts.[9] *Flowers v. Local 2602, United Steelworkers of America*, 622 F. 2d 573 (CA2 1980) (mem.). We granted certiorari and vacated and remanded for reconsideration in light of our reversal in *Mitchell*. *Steelworkers v. Flowers*, 451 U. S. 965 (1981). On remand, the Court of Appeals rejected the argument that the six-month period of § 10(b) applies. Accordingly, following our decision in *Mitchell*, it applied the 90-day arbitration statute and affirmed the dismissal as to the employer. As to the union, however, the Court reversed, concluding that the correct statute to apply was New York's three-year statute for malpractice actions.[10] 671 F. 2d 87 (CA2 1982).

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[8] N. Y. Civ. Prac. Law § 7511(a) (McKinney 1980).

[9] § 213(2).

[10] § 214(6).

C

In this Court, petitioners in both cases contend that suits under *Vaca v. Sipes*, 386 U. S. 171 (1967), and *Hines v. Anchor Motor Freight, Inc.*, 424 U. S. 554 (1976), should be governed by the six-month limitations period of § 10(b) of the National Labor Relations Act, 29 U. S. C. § 160(b). Alternatively, the Steelworkers, petitioners in No. 81-2408, argue that the state statute for vacation of arbitration awards should apply to a claim against a union as well as to one against an employer.[11] We granted certiorari in both cases and consolidated them for argument. 459 U. S. 1034 (1982).

II

A

As is often the case in federal civil law, there is no federal statute of limitations expressly applicable to this suit. In such situations we do not ordinarily assume that Congress intended that there be no time limit on actions at all; rather, our task is to "borrow" the most suitable statute or other rule of timeliness from some other source. We have generally concluded that Congress intended that the courts apply the most closely analogous statute of limitations under state law.[12] "The implied absorption of

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[11] DelCostello (petitioner in No. 81-2386) also contends that, if we decide that application of state law is appropriate, our decision in *Mitchell* should not be applied retroactively. We need not reach this contention.

[12] In some instances, of course, there may be some direct indication in the legislative history suggesting that Congress did in fact intend that state statutes should apply. More often,

State statutes of limitation within the interstices of the federal enactments is a phase of fashioning remedial details where Congress has not spoken but left matters for judicial determination within the general framework of familiar legal principles." *Holmberg v. Armbrecht*, 327 U. S. 392, 395 (1946).[13] See, *e.g.*, *Runyon v. McCrary*, 427 U. S.

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however, Congress has not given any express consideration to the problem of limitations periods. In such cases, the general preference for borrowing state limitations periods could more aptly be called a sort of fallback rule of thumb than a matter of ascertaining legislative intent; it rests on the assumption that, absent some sound reason to do otherwise, Congress would likely intend that the courts follow their previous practice of borrowing state provisions. See also *Auto Workers v. Hoosier Cardinal Corp.*, 383 U. S. 696, 703-704 (1966).

Justice Stewart pointed out in *Mitchell* that this line of reasoning makes more sense as applied to a cause of action expressly created by Congress than as applied to one found by the courts to be implied in a general statutory scheme – especially when that general statutory scheme itself contains a federal statute of limitations for a related but separate form of relief. 451 U. S., at 68, n. 4 (opinion concurring in the judgment); see also *McAllister v. Magnolia Petroleum Co.*, 357 U. S. 221, 228-229 (1958) (BRENNAN, J., concurring). The suits at issue here, of course, are amalgams, based on both an express statutory cause of action and an implied one. See *infra*, at 164-165, and n. 14. We need not address whether, as a general matter, such cases should be treated differently; even if this action were considered as arising solely under § 301 of the Labor Management Relations Act, 29 U. S. C. § 185, the objections to use of state law and the availability of a well-suited limitations period in § 10(b) would call for application of the latter rule.

[13] Respondents in No. 81-2386 argue that the Rules of Decision Act, 28 U. S. C. § 1652, mandates application of state statutes of limitations whenever Congress has provided none. The argument begs the question, since the Act authorizes application of state law only when federal law does not

160, 180-182 (1976); *Chevron Oil Co. v. Huson*, 404 U. S. 97, 101-105 (1971); *Auto Workers v. Hoosier Cardinal Corp.*, 383

"otherwise require or provide." As we recognized in *Hoosier, supra*, at 701, the choice of a limitations period for a federal cause of action is itself a question of federal law. If the answer to that question (based on the policies and requirements of the underlying cause of action) is that a timeliness rule drawn from elsewhere in federal law should be applied, then the Rules of Decision Act is inapplicable by its own terms. As we said in *United States v. Little Lake Misere Land Co.*, 412 U. S. 580 (1973):

"There will often be no specific federal legislation governing a particular transaction . . . ; here, for example, no provision of the . . . Act guides us to choose state or federal law in interpreting . . . agreements under the Act. . . . But silence on that score in federal legislation is no reason for limiting the reach of federal law. . . . To the contrary, the inevitable incompleteness presented by all legislation means that interstitial federal lawmaking is a basic responsibility of the federal courts. 'At the very least, effective Constitutionalism requires recognition of power in the federal courts to declare, as a matter of common law or "judicial legislation," rules which may be necessary to fill in interstitially or otherwise effectuate the statutory patterns enacted in the large by Congress. In other words, it must mean recognition of federal judicial competence to declare the governing law in an area comprising issues substantially related to an established program of government operation.' " *Id.*, at 593, quoting Mishkin, The Variousness of "Federal Law": Competence and Discretion in the Choice of National and State Rules for Decision, 105 U. Pa. L. Rev. 797, 800 (1957).

See also Westen & Lehman, Is There Life for *Erie* After the Death of Diversity?, 78 Mich. L. Rev. 311, 352-359 and nn. 122 and 142, 368-370, 377-378, 380, n. 207, 381-385 (1980); n. 21, *infra*.

Respondents in No. 81-2386 rely on a few turn-of-the-century cases suggesting that the Rules of Decision Act compels application of state limitations periods. See also *post*, at 173, n. 1 (STEVENS, J., dissenting). These cases, however, predate our

U. S. 696 (1966); *Chattanooga Foundry v. Atlanta*, 203 U. S. 390 (1906); *Campbell v. Haverhill*, 155 U. S. 610 (1895).

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recognition in *Erie R. Co. v. Tompkins*, 304 U. S. 64 (1938), that "the purpose of the section was merely to make certain that, in all matters except those in which some federal law is controlling, the federal courts exercising jurisdiction in diversity of citizenship cases would apply as their rules of decision the law of the State, unwritten as well as written." *Id.*, at 72-73 (footnote omitted); see also Warren, New Light on the History of the Federal Judiciary Act of 1789, 37 Harv. L. Rev. 49, 81-88 (1923). Since *Erie*, no decision of this Court has held or suggested that the Act requires borrowing state law to fill gaps in federal substantive statutes. Of course, we have continued since *Erie* to apply state limitations periods to many federal causes of action; but we made clear in *Holmberg v. Armbrecht*, 327 U. S. 392, 394-395 (1946), that we do so as a matter of interstitial fashioning of remedial details under the respective substantive federal statutes, and not because the Rules of Decision Act or the Erie doctrine requires it. "The considerations that urge adjudication by the same law in all courts within a State when enforcing a right created by that State are hardly relevant for determining the rules which bar enforcement of [a] . . . right created not by a State legislature but by Congress." 327 U. S. at 394; see also *Guaranty Trust Co. v. York*, 326 U. S. 99, 101 (1945); *Board of Comm'rs v. United States*, 308 U. S. 343, 349-352 (1939); *Hoosier*, 383 U. S., at 703-704; *id.*, at 709 (WHITE, J., dissenting); *Employees v. Westinghouse Corp.*, 348 U. S. 437, 463 (1955) (Reed, J., concurring).

We do not suggest that the *Erie* doctrine is wholly irrelevant to all federal causes of action. On the contrary, where Congress directly or impliedly directs the courts to look to state law to fill in details of federal law, Erie will ordinarily provide the framework for doing so. See, *e.g.*, *Commissioner v. Estate of Bosch*, 387 U. S. 456, 463-465 (1967) (applying *Erie* rules as to the proper source of state law in a tax case); 1A J. Moore, W. Taggart, A. Vestal & J. Wicker, Moore's Federal Practice ¶ 0.325 (2d ed. 1982); 19 C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure § 4515 (1982); Westen & Lehman, supra. But, as

In some circumstances, however, state statutes of limitations can be unsatisfactory vehicles for the enforcement of federal law. In those instances, it may be inappropriate to conclude that Congress would choose to adopt state rules at odds with the purpose or operation of federal substantive law.

> "[T]he Court has not mechanically applied a state statute of limitations simply because a limitations period is absent from the federal statute. State legislatures do not devise their limitations periods with national interests in mind, and it is the duty of the federal courts to assure that the importation of state law will not frustrate or interfere with the implementation of national policies. 'Although state law is our primary guide in this area, it is not, to be sure, our exclusive guide.' " *Occidental Life Ins. Co. v. EEOC*, 432 U. S. 355, 367 (1977), quoting *Johnson v. Railway Express Agency, Inc.*, 421 U. S. 454, 465 (1975).

Hence, in some cases we have declined to borrow state statutes but have instead used timeliness rules drawn from federal law – either express limitations periods from related federal statutes, or such alternatives as laches. In *Occidental*, for example, we declined to apply state limitations periods to enforcement suits brought by

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Holmberg recognizes, neither *Erie* nor the Rules of Decision Act can now be taken as establishing a *mandatory* rule that we apply state law in federal interstices. Indeed, the contrary view urged by respondents cannot be reconciled with the numerous cases that have declined to borrow state law, see *infra*, at 162-163, nor with our suggestion in *Hoosier* that we might not apply state limitations periods in a different case, 383 U. S., at 705, n. 7, 707, n. 9

the Equal Employment Opportunity Commission under Title VII of the 1964 Civil Rights Act, reasoning that such application might unduly hinder the policy of the Act by placing too great an administrative burden on the agency. In *McAllister v. Magnolia Petroleum Co.*, 357 U. S. 221 (1958), we applied the federal limitations provision of the Jones Act to a seaworthiness action under general admiralty law. We pointed out that the two forms of claim are almost invariably brought together. Hence, "with an eye to the practicalities of admiralty personal injury litigation," *id.*, at 224, we held inapplicable a shorter state statute governing personal injury suits. Again, in *Holmberg*, we held that state statutes of limitations would not apply to a federal cause of action lying only in equity, because the principles of federal equity are hostile to the "mechanical rules" of statutes of limitations. 327 U. S., at 396.

Auto Workers v. Hoosier Cardinal Corp. was a straightforward suit under § 301 of the Labor Management Relations Act, 29 U. S. C. § 185, for breach of a collective bargaining agreement by an employer. Unlike the present cases, *Hoosier* did not involve any agreement to submit disputes to arbitration, and the suit was brought by the union itself rather than by an individual employee. We held that the suit was governed by Indiana's six-year limitations period for actions on unwritten contracts; we resisted the suggestion that we establish some uniform federal period. Although we recognized that "the subject matter of § 301 is 'peculiarly one that calls for uniform law,' " 383 U. S., at 701, quoting *Teamsters v. Lucas Flour Co.*, 369 U. S. 95, 103 (1962), we reasoned that national uniformity is of less importance when the case does not

involve "those consensual processes that federal labor law is chiefly designed to promote – the formation of the collective agreement and the private settlement of disputes under it," 383 U. S., at 702. We also relied heavily on the obvious and close analogy between this variety of § 301 suit and an ordinary breach-of-contract case. We expressly reserved the question whether we would apply state law to § 301 actions where the analogy was less direct or the relevant policy factors different:

> "The present suit is essentially an action for damages caused by an alleged breach of an employer's obligation embodied in a collective bargaining agreement. Such an action closely resembles an action for breach of contract cognizable at common law. Whether other § 301 suits different from the present one might call for the application of other rules on timeliness, we are not required to decide, and we indicate no view whatsoever on that question. See, *e.g.*, *Holmberg v. Armbrecht*, 327 U. S. 392. . . . " 383 U. S., at 705, n. 7.

Justice Stewart, who wrote the Court's opinion in *Hoosier*, took this caution to heart in *Mitchell*. He concurred separately in the judgment, arguing that the factors that compelled adoption of state law in *Hoosier* did not apply to suits under *Vaca* and *Hines*, and that in the latter situation we should apply the federal limitations period of § 10(b). 451 U. S., at 65-71. As we shall explain, we agree.

B

It has long been established that an individual employee may bring suit against his employer for breach of a collective-bargaining agreement. *Smith v. Evening News Assn.*, 371 U. S. 195 (1962). Ordinarily, however, an employee is required to attempt to exhaust any grievance or arbitration remedies provided in the collective-bargaining agreement. *Republic Steel Corp. v. Maddox*, 379 U. S. 650 (1965); cf. *Clayton v. Automobile Workers*, 451 U. S. 679 (1981) (exhaustion of intraunion remedies not always required). Subject to very limited judicial review, he will be bound by the result according to the finality provisions of the agreement. See *W. R. Grace & Co. v. Rubber Workers*, 461 U. S. 757, 764 (1983); *Steelworkers v. Enterprise Corp.*, 363 U. S. 593 (1960). In *Vaca* and *Hines*, however, we recognized that this rule works an unacceptable injustice when the union representing the employee in the grievance/arbitration procedure acts in such a discriminatory, dishonest, arbitrary, or perfunctory fashion as to breach its duty of fair representation. In such an instance, an employee may bring suit against both the employer and the union, notwithstanding the outcome or finality of the grievance or arbitration proceeding. *Vaca v. Sipes*, 386 U. S. 171 (1967); *Hines v. Anchor Motor Freight, Inc.*, 424 U. S. 554 (1976); *United Parcel Service, Inc. v. Mitchell*, 451 U. S. 56 (1981); *Bowen v. USPS*, 459 U. S. 212 (1983); *Czosek v. O'Mara*, 397 U. S. 25 (1970). Such a suit, as a formal matter, comprises two causes of action. The suit against the employer rests on § 301, since the employee is alleging a breach of the collective-bargaining agreement. The suit against the union is one for breach of the union's duty of fair representation, which is implied under the

scheme of the National Labor Relations Act.[14] "Yet the two claims are inextricably interdependent. 'To prevail against either the company or the Union, . . . [employee-plaintiffs] must not only show that their discharge was contrary to the contract but must also carry the burden of demonstrating a breach of duty by the Union.' " *Mitchell, supra,* at 66-67 (Stewart, J., concurring in judgment), quoting *Hines, supra,* at 570-571. The employee may, if he chooses, sue one defendant and not the other; but the case he must prove is the same whether he sues one, the other, or both. The suit is thus not a straightforward breach-of-contract suit under § 301, as was *Hoosier,* but a hybrid § 301/fair representation claim, amounting to "a direct challenge to 'the private settlement of disputes under [the collective-bargaining agreement].' " *Mitchell, supra,* at 66 (Stewart, J., concurring in judgment), quoting

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[14] The duty of fair representation exists because it is the policy of the National Labor Relations Act to allow a single labor organization to represent collectively the interests of all employees within a unit, thereby depriving individuals in the unit of the ability to bargain individually or to select a minority union as their representative. In such a system, if individual employees are not to be deprived of all effective means of protecting their own interests, it must be the duty of the representative organization "to serve the interests of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct." *Vaca v. Sipes,* 386 U. S. 171, 177 (1967). See generally *Steele v. Louisville & N. R. Co.,* 323 U. S. 192 (1944); *Ford Motor Co. v. Huffman,* 345 U. S. 330, 337 (1953); *Syres v. Oil Workers,* 350 U. S. 892 (1955); *Humphrey v. Moore,* 375 U. S. 335, 342 (1964); R. Gorman, Labor Law 695-728 (1976). The duty stands "as a bulwark to prevent arbitrary union conduct against individuals stripped of traditional forms of redress by the provisions of federal labor law." *Vaca, supra,* at 182.

Hoosier, 383 U. S., at 702. Also unlike the claim in *Hoosier*, it has no close analogy in ordinary state law. The analogies suggested in *Mitchell* both suffer from flaws, not only of legal substance, but more important, of practical application in view of the policies of federal labor law and the practicalities of hybrid § 301/fair representation litigation.

In *Mitchell*, we analogized the employee's claim against the employer to an action to vacate an arbitration award in a commercial setting. We adhere to the view that, as between the two choices, it is more suitable to characterize the claim that way than as a suit for breach of contract. Nevertheless, the parallel is imperfect in operation. The main difference is that a party to commercial arbitration will ordinarily be represented by counsel or, at least, will have some experience in matters of commercial dealings and contract negotiation. Moreover, an action to vacate a commercial arbitral award will rarely raise any issues not already presented and contested in the arbitration proceeding itself. In the labor setting, by contrast, the employee will often be unsophisticated in collective-bargaining matters, and he will almost always be represented solely by the union. He is called upon, within the limitations period, to evaluate the adequacy of the union's representation, to retain counsel, to investigate substantial matters that were not at issue in the arbitration proceeding, and to frame his suit. Yet state arbitration statutes typically provide very short times in which to sue for vacation of arbitration awards.[15]

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[15] The majority of States require filing within 90 days (22 States and the District of Columbia) or three months (7 States).

Concededly, the very brevity of New York's 90-day arbitration limitations period was a major factor why, in *Mitchell*, we preferred it to the six-year statute for breach of contract, 451 U. S., at 63-64; but it does not follow that because six years is too long, 90 days is long enough. See also *Hoosier, supra*, at 707, n. 9. We conclude that state limitations periods for vacating arbitration awards fail to provide an aggrieved employee with a satisfactory opportunity to vindicate his rights under § 301 and the fair representation doctrine.[16]

See also 9 U. S. C. § 12. Only two States have longer periods – one for one year, the other for 100 days. Other statutes allow 30 days (6 States), 20 days (3 States), or 10 days (2 States). The remainder of the States either impose time limits based on terms of court or have no statutory provision on point.

[16] Besides its brevity, use of an arbitration limitations period raises knotty problems of categorization and consistency. Application of an arbitration statute seems straightforward enough when a grievance has run its full course, culminating in a formal award by a neutral arbitrator. But the union's breach of duty may consist of a wrongful failure to pursue a grievance to arbitration, as in *Vaca* and *Bowen*, or a refusal to pursue it through even preliminary stages. The parallel to vacation of an arbitral award seems tenuous at best in these situations; it is doubtful that many state arbitration statutes would themselves cover such a case in a commercial setting. Yet if it were thought necessary to apply different state rules to these different possibilities, the result would be radical variation in the treatment of cases that are not significantly different with regard to the principles of *Vaca*, *Hines*, and *Mitchell*. Moreover, the difficulty of detecting and mustering evidence to show the union's breach of duty may be even greater in these situations, and it may not be an easy task to ascertain when the cause of action accrues – obviously a matter of great importance when the statute of limitations may be as short as 30 days.

Moreover, as JUSTICE STEVENS pointed out in his opinion in *Mitchell*, analogy to an action to vacate an arbitration award is problematic at best as applied to the employee's claim against the union:

> "The arbitration proceeding did not, and indeed, could not, resolve the employee's claim against the union. Although the union was a party to the arbitration, it acted only as the employee's representative; the [arbitration panel] did not address or resolve any dispute between the employee and the union. . . . Because no arbitrator has decided the primary issue presented by this claim, no arbitration award need be undone, even if the employee ultimately prevails." 451 U. S., at 73 (opinion concurring in part and dissenting in part) (footnotes omitted).

JUSTICE STEVENS suggested an alternative solution for the claim against the union: borrowing the state limitations period for legal malpractice. *Id.*, at 72-75; see *post*, at 174 (STEVENS, J., dissenting); *post*, at 175 (O'CONNOR, J., dissenting). The analogy here is to a lawyer who mishandles a commercial arbitration. Although the short limitations period for vacating the arbitral award would protect the interest in finality of the opposing party to the arbitration, the misrepresented party would retain his right to sue his lawyer for malpractice under a longer limitations period. This solution is admittedly the closest state-law analogy for the claim against the union. Nevertheless, we think that it too suffers from objections peculiar to the realities of labor relations and litigation.

The most serious objection is that it does not solve the problem caused by the too-short time in which an

employee could sue his employer under borrowed state law. In a commercial setting, a party who sued his lawyer for bungling an arbitration could ordinarily recover his entire damages, even if the statute of limitations foreclosed any recovery against the opposing party to the arbitration. The same is not true in the § 301/fair representation setting, however. We held in *Vaca*, and reaffirmed this Term in *Bowen*, that the union may be held liable *only* for "increases if any in [the employee's] damages caused by the union's refusal to process the grievance." 386 U. S., at 197-198; 459 U. S., at 223-224; see *Czosek*, 397 U. S., at 29. Thus, if we apply state limitations periods, a large part of the damages will remain uncollectible in almost every case unless the employee sues within the time allotted for his suit against the employer.[17]

Further, while application of a short arbitration period as against employers would endanger employees' ability to recover most of what is due them, application of a longer malpractice statute as against unions would preclude the relatively rapid final resolution of labor disputes favored by federal law – a problem not present when a party to a commercial arbitration sues his lawyer. In No. 81-2408, for example, the holding of the Court of Appeals would permit a suit as long as three years after termination of the grievance proceeding; many States

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[17] Inability to sue the employer would also foreclose use of such equitable remedies as an order to arbitrate. See *Vaca*, 386 U. S., at 196.

provide for periods even longer.[18] What we said in *Mitchell* about the six-year contracts statute urged there can as easily be said here:

> "It is important to bear in mind the observations made in the *Steelworkers Trilogy* that 'the grievance machinery under a collective bargaining agreement is at the very heart of the system of industrial self-government. . . . The processing . . . machinery is actually a vehicle by which meaning and content are given to the collective bargaining agreement.' *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U. S. 574, 581 (1960). Although the present case involves a fairly mundane and discrete wrongful-discharge complaint, the grievance and arbitration procedure often processes disputes involving interpretation of critical terms in the collective-bargaining agreement affecting the entire relationship between company and union. . . . This system, with its heavy emphasis on grievance, arbitration, and the 'law of the shop,' could easily become unworkable if a decision which has given 'meaning and content' to the terms of an agreement, and even affected subsequent modifications of the agreement, could suddenly be called into question as much as [three] years later." 451 U. S., at 63-64.

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[18] One State's limitations period for legal malpractice is 10 years. Other statutes allow six years (10 States); five years (4 States); four years (5 States); three years (10 States and the District of Columbia); two years (16 States); and one year (4 States).

See also *Hoosier*, 383 U. S., at 706-707; *Machinists v. NLRB*, 362 U. S. 411, 425 (1960).[19]

These objections to the resort to state law might have to be tolerated if state law were the only source reasonably available for borrowing, as it often is. In this case, however, we have available a federal statute of limitations actually designed to accommodate a balance of interests very similar to that at stake here – a statute that is, in fact, an analogy to the present lawsuit more apt than any of the suggested state-law parallels.[20] We refer to § 10(b) of the National Labor Relations Act, which establishes a six-month period for making charges of unfair labor practices to the NLRB.[21]

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[19] The solution proposed by JUSTICE STEVENS also has the unfortunate effect of establishing different limitations periods for the two halves of a § 301/fair representation suit. A very similar consideration led us to reject borrowing of a state statute in *McAllister v. Magnolia Petroleum Co.*, 357 U. S. 221 (1958). See also *Vaca, supra*, at 186-188 and n. 12; *Clayton v. Automobile Workers*, 451 U. S. 679, 694-695 (1981).

[20] This is not to say that the sole options available are a federal statute of limitations or a state one. As *Holmberg* and *Occidental* show, see *supra*, at 161, 162, we have sometimes concluded that Congress' intention can best be carried out by imposing no predefined limitations period at all.

[21] JUSTICE STEVENS suggested in *Mitchell* that use of § 10(b) is inappropriate because there is no indication in its language or history that Congress intended the section to be applied in the present context. 451 U. S., at 75-76 and nn. 8, 9 (opinion concurring in part and dissenting in part). With all respect, we think that this observation, while undoubtedly correct, is beside the point. The same could be said with equal or greater accuracy about the intent of the New York and Maryland legislatures when they enacted their respective arbitration or malpractice

The NLRB has consistently held that all breaches of a union's duty of fair representation are in fact unfair labor practices. *E. g., Miranda Fuel Co.*, 140 N. L. R. B. 181 (1962), enf. denied, 326 F. 2d 172 (CA2 1963). We have twice declined to decide the correctness of the Board's position,[22] and we need not address that question today. Even if not all breaches of the duty are unfair labor practices, however, the family resemblance is undeniable, and indeed there is a substantial overlap. Many fair representation claims (the one in No. 81-2386, for example) include allegations of discrimination based on membership status or dissident views, which would be unfair labor practices under § 8(b)(1) or (2). Aside from these clear cases, duty-of-fair-representation claims are allegations of unfair, arbitrary, or discriminatory treatment of workers by unions – as are virtually all unfair labor practice charges made by workers against unions. See generally R. Gorman, Labor Law 698-701 (1976). Similarly, it may be the case that alleged violations by an employer of a collective-bargaining agreement will also amount to unfair labor practices. See *id.*, at 729-734.

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statutes of limitations. See *Occidental Life Ins. Co. v. EEOC*, 432 U. S. 355, 367 (1977); n. 12, *supra*. In either situation we are applying a statute of limitations to a different cause of action, not because the legislature enacting that limitations provision intended that it apply elsewhere, but because it is the most suitable source for borrowing to fill a gap in federal law. See also *Mitchell*, 451 U. S., at 61, n. 3; n. 13, *supra*.

[22] *Vaca, supra*, at 186; *Humphrey*, 375 U. S., at 344; see *Mitchell*, 451 U. S., at 67-68, n. 3 (Stewart, J., concurring in judgment).

At least as important as the similarity of the rights asserted in the two contexts, however, is the close similarity of the considerations relevant to the choice of a limitations period. As Justice Stewart observed in *Mitchell:*

> "In § 10(b) of the NLRA, Congress established a limitations period attuned to what it viewed as the proper balance between the national interests in stable bargaining relationships and finality of private settlements, and an employee's interest in setting aside what he views as an unjust settlement under the collective-bargaining system. That is precisely the balance at issue in this case. The employee's interest in setting aside the 'final and binding' determination of a grievance through the method established by the collective-bargaining agreement unquestionably implicates 'those consensual processes that federal labor law is chiefly designed to promote – the formation of the . . . agreement and the private settlement of disputes under it.' *Hoosier,* 383 U. S., at 702. Accordingly, '[t]he need for uniformity' among procedures followed for similar claims, *ibid.*, as well as the clear congressional indication of the proper balance between the interests at stake, counsels the adoption of § 10(b) of the NLRA as the appropriate limitations period for lawsuits such as this." 451 U. S., at 70-71 (opinion concurring in the judgment) (footnote omitted).

We stress that our holding today should not be taken as a departure from prior practice in borrowing limitations periods for federal causes of action, in labor law or elsewhere. We do not mean to suggest that federal courts should eschew use of state limitations periods anytime

state law fails to provide a perfect analogy. See, *e.g.*, *Mitchell*, 451 U. S., at 61, n. 3. On the contrary, as the courts have often discovered, there is not always an obvious state-law choice for application to a given federal cause of action; yet resort to state law remains the norm for borrowing of limitations periods. Nevertheless, when a rule from elsewhere in federal law clearly provides a closer analogy than available state statutes, and when the federal policies at stake and the practicalities of litigation make that rule a significantly more appropriate vehicle for interstitial lawmaking, we have not hesitated to turn away from state law. See *supra*, Part II-A, *supra*. As Justice Goldberg cautioned, "[I]n this Court's fashioning of a federal law of collective bargaining, it is of the utmost importance that the law reflect the realities of industrial life and the nature of the collective bargaining process. We should not assume that doctrines evolved in other contexts will be equally well adapted to the collective bargaining process." *Humphrey v. Moore*, 375 U. S. 335, 358 (1964) (opinion concurring in result).

III

In No. 81-2408, it is conceded that the suit was filed more than ten months after respondents' causes of action accrued. The Court of Appeals held the suit timely under a state three-year statute for malpractice actions. Since we hold that the suit is governed by the six-month provision of § 10(b), we reverse the judgment.

The situation is less clear in No. 81-2386. Depending on when the joint committee's decision is thought to have been rendered, the suit was filed some seven or eight

months afterwards. Petitioner DelCostello contends, however, that certain events operated to toll the running of the statute of limitations until about three months before he filed suit. Since the District Court applied a 30-day limitations period, it expressly declined to consider any tolling issue. 524 F. Supp., at 725. Hence, the judgment is reversed and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE STEVENS, dissenting.

For the past century federal judges have "borrowed" state statutes of limitations, not because they thought it was a sensible form of "interstitial law making", but rather because they were directed to do so by the Congress of the United States.[1]

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[1] In 1789 the First Congress enacted the Rules of Decision Act (Act), Rev. Stat. § 721, 1 Stat. 92, plainly stating:

"That the laws of the several states, except where the constitution, treaties or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States in cases where they apply."

In 1895, construing that Act, we held that state statutes of limitations provided the relevant rules of decision in patent infringement actions, explaining:

"That this section [Rev. Stat. § 721] embraces the statutes of limitations of the several States has been decided by this court in a large number of cases, which are collated in its opinion in *Bauserman v. Blunt*, 147 U. S. 647. . . . Indeed, to no class of state legislation has the above provision been more steadfastly and consistently applied than to statutes prescribing the time within

Today the Court holds that the Rules of Decision Act does not determine the result in this case, because it believes that a separate federal law, growing out of "the policies and requirements of the underlying cause of action," *ante*, at 159, n. 13, "otherwise require[s] or provide[s]." The Court's opinion sets forth a number of reasons why it may make good sense to adopt a six-month statute of limitations, but nothing in that opinion persuades me that the Constitution, treaties, or statutes of the United States "require or provide" that this particular limitations period must be applied to this case.[2]

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which actions shall be brought within its jurisdiction." *Campbell v. Haverhill*, 155 U. S. 610, 614.

Accord, *McClaine v. Rankin*, 197 U. S. 154 (1905). In response to the suggestion that the Act was not intended to govern nondiversity cases raising federal questions – such as patent suits or suits under the National Labor Relations Act – we bluntly observed that "[t]he section itself neither contains nor suggests such a distinction." 155 U. S., at 616.

[2] When the Court recognized the cause of action in *Vaca v. Sipes*, 386 U. S. 171 (1967), the majority explained: "We cannot believe that Congress, in conferring upon employers and unions the power to establish exclusive grievance procedures, intended to confer upon unions . . . unlimited discretion to deprive injured employees of all remedies for breach of contract." *Id.*, at 186. But nothing in the language, structure, or legislative history of the National Labor Relations Act compels the *further* conclusion that Congress intended the federal judiciary to abandon the traditional practice of borrowing state statutes of limitations when no federal statute directly applies. Saying that a statute impliedly creates a cause of action is not the same thing as saying that it impliedly commands the courts to abandon the standard procedure for choosing limitations periods and instead to borrow a period that Congress established for a different purpose.

Congress has given us no reason to depart from our settled practice, grounded in the Rules of Decision Act, of borrowing analogous state statutes of limitation in cases such as this. For the reasons set forth in my separate opinion in *United Parcel Service, Inc. v. Mitchell*, 451 U. S. 56, 71 (1981), I believe that in a suit for a breach of the duty of fair representation, the appropriate "laws of the several states" are the statutes of limitations governing malpractice suits against attorneys. I would apply those laws to resolve the worker-union disputes in these two cases. And I would continue to abide by our holding in Mitchell in resolving the employee-employer dispute presented in No. 81-2386.

For these reasons, I respectfully dissent.

JUSTICE O'CONNOR, dissenting.

As the Court recognizes, "resort to state law [is] the norm for borrowing of limitations periods." *Ante*, at 171. When federal law is silent on the question of limitations, we borrow state law in the belief that, given our long-standing practice and congressional awareness of it, we can safely assume, in the absence of strong indications to the contrary, that Congress intends by its silence that we follow the usual rule.[1] In *Auto Workers v. Hoosier Cardinal*

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[1] I believe, basically for the reasons given by the Court, *ante*, at 159-161, n. 13, that our practice of borrowing state periods of limitations depends largely on this general guide for divining congressional intent. See, *e. g., Auto Workers v. Hoosier Cardinal Corp.*, 383 U. S. 696, 704 (1966); *Holmberg v. Armbrecht*, 327 U. S. 392, 395 (1946). I agree with the Court that the Rules of Decision Act, 28 U. S. C. § 1652, only puts the question, for it simply requires application of state law unless federal law

Corp., 383 U. S. 696 (1966), we applied the "norm" to a suit under § 301 of the Labor Management Relations Act, 29 U. S. C. § 185. I see no reason in these cases to depart from our usual practice of borrowing state law, for we have no contrary indications strong enough to outweigh our ordinary presumption that Congress' silence indicates a desire that we follow the ordinary rule. As a result, I would look to state law for a limitations period. For the reasons given by JUSTICE STEVENS in his separate opinion in *United Parcel Service, Inc. v. Mitchell*, 451 U. S. 56, 72-74 (1981), I think that a malpractice action against an attorney provides the closest analogy to an employee's suit against his union for breach of the duty of fair representation, and I would apply the state's statute of limitations for such an action here. In DelCostello's action against his employer, I, like JUSTICE STEVENS, would follow *Mitchell*.[2]

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applies. See *ante*, at 159-161, n. 13. Therefore, I am unable to join JUSTICE STEVENS' dissent. My disagreement with the Court arises because I do not think that federal law implicitly rejects the practice of borrowing state periods of limitations in this situation.

[2] It is quite appropriate to apply *Mitchell* retroactively. *Mitchell* did not represent a "clear break" with past law, see *Mitchell*, 451 U. S., at 61-62, application of its rule in this case would further the goal of promoting early finality for arbitral awards, *id.*, at 63, and there is no inequity in applying the rule here. See *Lawson v. Truck Drivers, Chauffeurs & Helpers*, 698 F. 2d 250, 254 (CA6 1983); see generally *Chevron Oil Co. v. Huson*, 404 U. S. 97 (1971).

SCOTT, WILLIAM, JR., VICTOR SHELTON, JAMES JOHNSON, JOSEPH APPEZATO, DANIEL DAVIS, IZELL HODGES, THOMAS CZEKAY, JAMES L'HEUREUX, LEONARD MURAWSKI, PETER BOBER, FRANK NELSON, WINSTON E. THOMAS, ORA LEE BOOKER, RALPH L. CAMPBELL, JR., ROBERT MORRIS, ISAIH REECE, CORDIE GUYTON, LEROY WHITE, RONNIE COX, SAMUEL C. QUAINOO, STEVE GUYTON, JAMES E. WHITE, PRINCE BURWELL, FREDERICK SIMMONS, WILLIAM SCOTT, ADAM GORDON, GEORGE HILL, HAL PORTER, ALGER JENKINS, JOSEPH COGDELL, WILLIE LEE ALEXANDER, WALTER LEE, EUGENE CHESTNUT, DAVID THOMAS and ISSIAH ROLACH, Appellants v. LOCAL 863, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMENT, AND HELPERS OF AMERICA, FOOD HAULERS, INC., A CORPORATION DOING BUSINESS IN THE STATE OF NEW JERSEY, and WAKEFERN FOOD CORPORATION, A CORPORATION DOING BUSINESS IN THE STATE OF NEW JERSEY

SCOTT v. LOCAL 863, INTL. BHD. OF TEAMSTERS

No. 83-5352

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

725 F.2d 226; 115 L.R.R.M. 2531; 99 Lab Cas. (CCH) P10,723

Submitted Under Third Circuit Rule 12(b)
November 16, 1983 January 13, 1984

PRIOR HISTORY:

On Appeal from the United States District Court for the District of New Jersey

C.A. No. 82-3383

COUNSEL: CRAIG AND EDELSTEIN, P.A., West Caldwell, New Jersey 07006, for Appellants

ZAZZALI, ZAZZALI & KROLL, Newark, New Jersey 07102, for Local 863, etc.

KENNETH I. NOWAK, ALBERT G. KROLL, GROTTA, GLASSMAN & HOFFMAN, P.A., Roseland, New Jersey 07068, STEPHEN A. PLOSCOWE, DONALD B. SHANIN, for Food Haulers, Inc., and Wakefern Food Corporation

OPINIONBY: ADAMS

OPINION:

Before: ADAMS and BECKER, Circuit Judges, and NEWCOMER, District Judge.*

OPINION OF THE COURT

ADAMS, Circuit Judge.

This is an appeal from the dismissal of a suit brought by 35 laid off employees against Local 863 of the International Brotherhood of Teamsters, Food Haulers, Inc., and Wakefern Food Corporation. The laid off employees charged Local 863 with a breach of the duty of fair representation and the companies with a breach of the collective bargaining agreement. The district court found the suit to be time barred, having been filed beyond the three-month statute of limitations contained in the New Jersey Arbitration and Award statute, N.J.S.A. 2A:24-27.

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* Hon. Clarence C. Newcomer, United States District Court for the Eastern District of Pennsylvania, sitting by designation.

Since the time of the district court's ruling, however, the rule for determining which statute of limitations is applicable has been changed as a result of DelCostello v. Int'l Bhd. of Teamsters, 462 U.S. 151, 103 S. Ct. 2281, 76 L. Ed. 2d 476 (1983). In light of DelCostello, we vacate the district court's dismissal of the suit and remand for further proceedings.

I

Between October 23 and October 30, 1981, Food Haulers, Inc., a subdivision of Wakefern Food Corporation, laid off 28 employees who were members of Local 863; nine of these employees were subsequently rehired as a result of arbitration unrelated to the case at bar. [This initial group of nineteen employees will hereinafter be referred to as the "October Plaintiffs."] On April 8, 1982, Food Haulers laid off 16 more employees, including the nine who had been reinstated as a result of the arbitration. [These sixteen employees will hereinafter be termed the "April plaintiffs."]

On February 5, 1982, three-and-a-half months after the initial layoffs, Local 863 advised counsel for the October plaintiffs that it did not intend to proceed to arbitration on their behalf. As is customary under the terms of a collective bargaining agreement, only the union or the company may process a grievance to arbitration; the employees, themselves, did not have a right to do so. On February 17, the attorney for the October plaintiffs replied that the employees would appeal the decision of Local 863 to the local, as well as regional joint council of Teamster locals and the union's International. The joint

council replied on February 22 that, since the dispute involved the interpretation and application of the local collective bargaining agreement, the matter was within the sole discretion of Local 863; the International did not respond. Local 863 granted the October plaintiffs' one last appeal to its executive board on March 5, but then advised the employees' attorney on April 7 that "Local 863, as it did in October 1981, has determined not to proceed to arbitration regarding your clients' layoffs." App. at 42. On April 8, 1982, the second group of sixteen employees was laid off. On May 14, a letter was sent by Local 863, declaring that these layoffs would also not be arbitrated. This lawsuit, covering all 35 laid off employees, was filed on October 8, 1982, under § 301 of the National Labor Relations Act, 29 U.S.C. § 185 (1976).

II

The principal question on this appeal is whether the district court erred in concluding that the suit was filed in an untimely fashion. The decision by the district judge regarding the applicable statute of limitations was based on the then controlling Supreme Court case, United Parcel Service v. Mitchell, 451 U.S. 56, 67 L. Ed. 2d 732, 101 S. Ct. 1559 (1981). Under Mitchell, federal courts were directed to look to the most "appropriate" state statute in determining the time limitations on the filing of a § 301 suit:

Congress has not enacted a statute of limitations governing actions brought pursuant to § 301 of the LMRA. As this Court pointed out in Auto Workers v. Hoosier Cardinal Corp., 383 U.S. 696, 704-05 86 S. Ct.

1107, 18 L. Ed. 2d 192 (1966), "the timeliness of a § 301 suit . . . is to be determined, as a matter of federal law, by reference to the appropriate state statute of limitations." Our present task is to determine which limitations period is "the most appropriate one provided by state law." Johnson v. Railway Express Agency, Inc., 421 U.S. 454, 462, 44 L. Ed. 2d 295, 95 S. Ct. 1716 (1975). This depends upon an examination of the nature of the federal claim and the federal policies involved. See Hoosier Cardinal, supra, at 706-707.

Id. at 60-61 (footnote omitted). In Mitchell the Supreme Court relied upon a New York state statute governing appeals from arbitration to find a ninety-day limit for the filing of an action that would have the effect of overturning an arbitrator's ruling. Mitchell recognized that state statutes of limitation would not necessarily fit "hand in glove," id. at 64, but should be applied nonetheless.

Although the present case, does not involve an arbitration award as such, the district court found that the issue presented was more closely akin to an appeal from an arbitration decision than to a general breach of contract claim. Consequently, it ruled that the New Jersey 90-day state statute rather than the state's six-year "catch-all" statute of limitations, N.J.S.A. 2A:14-1. Subsequent to the district court's ruling in the present case, the Supreme Court in DelCostello adopted a uniform federal statute of

limitation for § 301 cases.[1] Thus in light of DelCostello the governing statute of limitations for an action such as the one before us today is six months.

We must now determine whether DelCostello should apply retroactively to the case at bar. As a general rule, federal courts should apply the law in effect at the time that cases are adjudicated. Gulf Offshore Co. v. Mobil Oil Corp., 453 U.S. 473, 486, 69 L. Ed. 2d 784, 101 S. Ct. 2870 n.16 (1981). The primary consideration in this regard is whether retroactive application will change in the decisional law. Chevron Oil Co. v. Huson, 404 U.S. 97, 92 S. Ct. 349, 30 L. Ed. 2d 296 (1971). Viewed in light of the

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[1] Mitchell anticipated DelCostello in the following footnote:

Amicus the American Federation of Labor and Congress of Industrial Organizations has filed a brief arguing that, in cases such as the present, courts should apply the 6-month limitations period found in § 10(b) of the National Labor Relations Act, 29 U.S.C. § 160(b). The AFL-CIO distinguishes the above-quoted language from Hoosier Cardinal on the ground that Hoosier Cardinal involved a § 301 action by a union against an employer, while actions brought by employees against both their union and employer pursuant to our decision in Vaca v. Sipes, 386 U.S. 171, 17 L. Ed. 2d 842, 87 S. Ct. 903 (1967), and Hines v. Anchor Motor Freight, Inc., 424 U.S. 554, 47 L. Ed. 2d 231, 96 S. Ct. 1048 (1976), are hybrid § 301 breach-of-duty actions, the union's duty being implied from the NLRA. We decline to consider this argument since it was not raised by either of the parties here or below. See Bell v. Wolfish, 441 U.S. 520, 532, 60 L. Ed. 2d 447, 99 S. Ct. 1861, n.13, (1979); Knetsch v. United States, 364 U.S. 361, 370 5 L. Ed. 2d 128, 81 S. Ct. 132 (1960). Our grant of certiorari was to consider which state limitations period should be borrowed, not whether such borrowing was appropriate.

451 U.S. at 60 n.2.

Supreme Court's decision to apply a uniform national statute of limitations to § 301 claims, we find no obstacle to the retroactive application of DelCostello to the present case. As this Court held in Perez v. Dana Corporation, 718 F.2d 581, slip op. 228 (3d Cir. 1983), "the purpose of the DelCostello rule . . . impel[s] retroactive application of that decision." But see Ernst v. Indiana Bell, 714 F.2d 150, 113 LRRM 3816 (7th Cir. June 28, 1983), aff'g Ernst v. Indiana Bell, 30 Fair Empl. Prac. Cas. (BNA) 1248, 112 LRRM 2565 (S.D. Ind. 1982), cert. denied, 464 U.S. 1041, 104 S. Ct. 707, 79 L. Ed. 2d 171 (1984) (Seventh Circuit affirmed district court reliance on Indiana's 90-day statute of limitations despite intervening DelCostello ruling).

III

Under the DelCostello six-month statute of limitations the sixteen employees laid off on April 8, 1982, clearly filed their suits in a timely fashion. The suit filed by the nineteen October plaintiffs, however, presents a more difficult issue.

In order to determine whether the October plaintiffs timely filed their lawsuit, we must first ascertain when the statute of limitations began to run. If these employees were required to exhaust internal union appeals, this would be a relatively straightforward factual matter. The Supreme Court, however, has refused to require union members to exhaust all possible internal union remedies for a § 301 suit to go forward. Instead the Court has created a case-by-case factual standard turning on the issue of when it becomes clear that further internal appeals would be futile. Clayton v. Automobile Workers,

451 U.S. 679, 689-93, 101 S. Ct. 2088, 68 L. Ed. 2d 538 (1981). See also Goclowski v. Penn Central, 571 F.2d 747, 758 (3d Cir. 1978) (union members not foreclosed from judicial relief when officers announce no further internal remedies available); Santos v. Dist. Council, 619 F.2d 963, 969 (2d Cir. 1980) (cause of action accrues when plaintiff first could have successfully maintained a suit based on that case of action).

One of the difficulties in the present case is establishing when the futility of further union appeals become apparent or should have become apparent to the October plaintiffs. We note that their suit was filed on October 8, 1982, almost one year after they were laid off. On February 5, 1982, the local union's attorney stated unequivocally in a letter that "Local 863 does not see any basis for proceeding to arbitration." App. at 33. The employees' counsel sent a letter on February 17, which accepted the local's letter as indicating "that the Union will take no action on behalf of my clients." App. at 34. On February 22, the attorney for the joint council also informed the plaintiffs by letter that no action would be taken on their behalf. These letters would place the October layoffs outside the six-month statute of limitations by the time of the filing of the lawsuit. Only if the April 7 letter of local counsel reaffirming the refusal by Local 863 to proceed to arbitration is taken as the termination of the internal appeal procedure is taken is the termination of the internal appeal procedure and if the statute of limitations is held to begin running when that letter was received by plaintiffs' counsel (rather than the date of mailing) can

this suit survive for the October plaintiffs under DelCostello.[2]

Because the district court dismissed the suit as time barred under the New Jersey three-month statute, these questions were not adjudicated. It would be inappropriate for an appellate court to attempt to resolve these factual matters in the first instance.

IV

Accordingly, this case will be remanded to the district court for further proceedings consistent with this opinion.

CONCURBY: BECKER

CONCUR: BECKER, J., concurring.

I join in the judgment of the Court and in all but part III of Judge Adams' opinion. I write separately because I fear that the majority has established a novel and inadequately confined precedent that will, in a Vaca v. Sipes-

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[2] Should the district court find that under the applicable rules the mailing date begins the running of the statute of limitations, this would preclude suit by the October plaintiffs regardless of when the futility of further internal union appeals is determined to have become apparent. Under these circumstances and especially since we are without the benefit of briefs or argument on the question of when the point of futility is reached in internal union proceedings. We decline at this time to define the precise determinations. Although we agree with Judge Becker that this is a task worthy of consideration, we do not believe what it is proper for this court presently to undertake this assignment, especially in the absence of a factual record on this subject from the trial court.

type suit, enable a union defendant to assert the futility of exhausting its own internal remedies as a trigger for the running of the short (6 months) DelCostello statute of limitations and thereby unfairly trap unwary suitors. This concern is not academic; rather, it responds to a troublesome dilemma frequently faced by litigants in this circuit. The problem may be seen by exploring the following scenario, which mirrors the facts of this case.

Assume that an employee filed a suit under § 301 of the LMRA, 29 U.S.C. § 185 (1976), alleging a breach of the collective bargaining agreement by his employer and a breach of the duty of fair representation by his union, at a time when nominal procedures exist whereby the union might still activate (or reactivate) the employee's grievance. Under existing caselaw, the union can argue, subject to the limitations set forth in Clayton v. Automobile Workers, 451 U.S. 679, 689, 101 S. Ct. 2088, 68 L. Ed. 2d 538 (1981), that these procedures are genuinely available and bar the defendant from suit.[1] That situation existed in this case: Local 863 originally pleaded in its answer in the district court that the action should be dismissed for want of exhaustion, but has abandoned the claim. Assume further, however, that the union argues that, because the availability of real internal remedies ceased more than six months ago and because suits against the union were thus permissible under Clayton for more than six months before the plaintiff filed suit, the DelCostello statute of limitations now bars the employee's action against it. This situation has also occurred here and yet the majority, without significant support in precedent,

and without explanation, would apparently accept this argument.[2]

The problem is that, unlike other situations where the twin defenses of failure to exhaust and the statute of limitations combine to give the litigant a narrow window in which to file suit, here there is no guarantee that statutes, regulations, or other forms of clear, written notice will exist that warn the plaintiff of his peril. On the contrary, precisely because the majority here has allowed it to benefit them in litigation, union officials may well be equivocal or contradictory in their communications to dissatisfied members and may send such communications through persons within the internal union hierarchy whose authority to bind the union is at best hazy. As a result, the potential suitor will not know when exhaustion is futile.

Several harmful consequences are likely to follow from court-inspired vagueness of these union communications. First will come a guessing game. To determine whether a plaintiff's suit can go forward, overburdened district courts will be remitted to a tedious and often useless search through the vagaries of union bylaws or will be forced to rationalize informal union procedures likely to have been invented for each dispute. If it is

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[2] It is conceivable that the majority has simply deferred outlining the precise contours of the defense it establishes until a district court has held the defense to bar suit. While I sympathize with the desire not to decide unnecessary issues, I believe it is preferable here to specify the rule of law to be applied on remand. The factual record is ample, and the issue squarely before us.

thereby determined that the suitor has not exhausted, his day in court is, at worst, delayed. But if, in reliance on what he thought were genuine internal remedies, he refrains from suing for as much as six months, and it is ultimately determined that these remedies were illusory, his suit will be forever barred. Second, to avoid this trap, employee plaintiffs will have to file numerous precautionary lawsuits – each of which will require the courts to undertake the bootless inquiry described below – in the hopes that perhaps one of the suits will have been timed correctly.

Were this guessing game to work only to the disadvantage of employees, a case could conceivably be made that the problem is best left to the internal majoritarian processes of the union. Union members arguably might cure the problem either by voting to decertify unions that disadvantaged them in this fashion or by voting – if such be permitted – for internal union procedures that made clear when internal exhaustion occurred. However, those with a grievance against against [sic] their union arising out of some breach of the duty of fair representation are not likely to have possessed the power to bring about fair and clear internal union procedures. Moreover, where the likely complexities or arbitrariness of union procedures burden the courts as well, I see no reason to defer to its alleged majoritarian processes.

I think we should eliminate guesswork by conditioning union use of this pincer defense on its compliance with a rule of fundamental fairness. Specifically, a defendant in a Vaca v. Sipes style suit under section 301 of the LMRA should be able to invoke the Clayton "futility

exception" and thus start the DelCostello statute of limitations running only from the time that the employee has received from it a clear, written statement telling him that further internal appeals are futile, and the time for judicial action has begun. This would be analogous to a right to sue letter in employment discrimination law. Alternatively – and I believe equivalently – the union may start the statute of limitations running by waiving (in equally express terms) any reliance on its right under Clayton to bar suits for the failure of the employee to exhaust internal union remedies.

Accordingly, I would remand this case to allow the district court to determine whether and when the other plaintiffs were given such notice by the union defendants. If they were not, I would let their suit proceed.

29 U.S.C. § 185. Suits by and against labor organizations

(a) Venue, amount, and citizenship. Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

(b) Responsibility for acts of agent; entity for purposes of suit; enforcement of money judgments. Any labor organization which represents employees in an industry affecting commerce as defined in this Act and any employer whose activities affect commerce as defined in this Act shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.

(c) Jurisdiction. For the purposes of actions and proceedings by or against labor organizations in the district courts of the United States, district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in representing or acting for employee members.

(d) Service of process. The service of summons, subpoena, or other legal process of any court of the United States upon an office or agent of a labor organization, in his capacity as such, shall constitute service upon the labor organization.

(e) Determination of question of agency. For the purposes of this section, in determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

(June 23, 1947, ch 120, Title III, § 301, 61 Stat. 156.)

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28 U.S.C. § 1652. State laws as rules of decision

The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.

(June 25, 1948, ch 646, § 1, 62 Stat. 944.)

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29 U.S.C. § 160. Prevention of unfair labor practices

(a) Powers of Board generally. The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8 [29 USCS § 158]) affecting commerce. This

power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: Provided, That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominantly local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this Act [29 USCS §§ 151-158, 159-169] or has received a construction inconsistent therewith.

(b) Complaint and notice of hearing; answer; court rules of evidence inapplicable. Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: Provided, That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his

discharge. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent, or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States [28 USCS Appx] under the rules of civil procedure for the district courts of the United States, adopted by the Supreme Court of the United States pursuant to the Act of June 19, 1934 (U. S. C., title 28, secs. 723-B, 723-C) [28 USCS § 2072].

Supreme Court, U.S.
FILED
JUN 25 1996
CLERK

No. 95-1910

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

THOMAS R. ZIMMER and SUZANNE K. ZIMMER,
Petitioners,

v.

AMERICAN TELEPHONE AND TELEGRAPH COMPANY OF MICHIGAN, MICHIGAN BELL TELEPHONE COMPANY, COMMUNICATIONS WORKERS OF AMERICA and COMMUNICATIONS WORKERS OF AMERICA LOCAL 4009,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF IN OPPOSITION FOR RESPONDENT UNIONS

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QUESTION PRESENTED

Does the six month statute of limitations contained in § 10(b) of the National Labor Relations Act bar a hybrid action for breach of the duty of fair representation and breach of collective bargaining agreements filed more than six months after the plaintiff-employee was told by his union that there was nothing more the union could do with respect to his contract claim?

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National Labor Relations Act:

§ 8 6
§ 10(b) 4, 5, 6

IN THE

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OCTOBER TERM, 1995

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THOMAS R. ZIMMER and SUZANNE K. ZIMMER,
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BRIEF IN OPPOSITION FOR RESPONDENT UNIONS

STATEMENT OF THE CASE

Thomas R. Zimmer was an employee of the Michigan Bell Telephone Company from June 1973 until the end of 1983, when he transferred his employment to the American Telephone & Telegraph Company as part of that company's divestiture of its local telephone operating companies. App. 6. Mr. Zimmer then worked at AT&T until he was laid-off for lack of work in September 1989. *Id.* During this entire time, Mr. Zimmer was employed in bargaining units represented by the Communications Workers of America and covered by collective bargaining agreements between the Union and his employers. *Id.*

Under CWA's collective bargaining agreement with AT&T, Mr. Zimmer had a right to be recalled to employment on a seniority basis should a vacancy occur. App. 6-7. He had similar recall rights under the CWA-Michigan Bell agreement for a period of two years after being laid-off by AT&T. App. 7.[1]

When he was laid-off by AT&T, Mr. Zimmer was given a "termination packet" that included a recall interest form. App. 7. Completing the recall interest form was a prerequisite to being recalled pursuant to the various labor agreements. *Id.* Mr. Zimmer claims to have completed a recall interest form, but AT&T has no record of ever receiving a completed form from him. *Id.*

In September 1991, Mr. Zimmer learned that laid-off employees with less seniority than he had been recalled by Michigan Bell. App. 7. Thereafter, Mr. Zimmer began making inquires about why he had not been recalled to employment at Michigan Bell. *Id.*

In February 1993, Mr. Zimmer requested that CWA file a grievance on his behalf with respect to his recall rights. App. 7-8. After investigating Mr. Zimmer's claim, CWA determined that it lacked merit. R. 5: Affidavit of Richard T. Jordan ¶¶ 6-7. *See* App. 8. On this basis, the Union declined to file a grievance on his behalf. *Id.*

On May 27, 1993, Mr. Zimmer wrote to CWA Representative Richard Jordan inquiring as to whether CWA

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[1] Mr. Zimmer retained recall rights at Michigan Bell pursuant to various agreements among AT&T, its affiliates, and the unions representing employees at those telephone companies. *See* R. 9: Plaintiffs' Response to CWA's Summ. Judg. Mot., Exhibit 1 *United States v. Western Electric Co.*, D.D.C. No. 82-0192, Plan of Reorganization pp. 274-275 (describing these agreements). The district court erroneously refers to these rights as arising from the order in *United States v. Western Electric.* App. 6. However, in this regard, the *Western Electric* order does nothing more than describe agreements reached between the telephone companies and the unions representing their employees. *See* R. 9: Plan of Reorganization pp. 274-275.

would file a grievance on his behalf. R. 27-1: Zimmer to Jordan (May 27, 1993). In this regard, Mr. Zimmer's letter asked:

> As you are aware, many months had elapsed while I waited for some response from AT&T and Michigan Bell. I had hoped that the CWA would arrive at a decision more quickly, but I am still waiting.
>
> Will the CWA file a grievance against AT&T and Michigan Bell on my behalf, followed by arbitration if necessary? [*Id.*]

CWA Representative Jordan responded to this inquiry in a letter received by Mr. Zimmer on June 25, 1993. App. 8. Mr. Jordan's letter to Mr. Zimmer stated:

> I am in receipt of your most recent letter dated May 27, 1993, regarding Michigan Bell and AT&T. Pursuant to all your correspondence and our meeting of March 10, 1993, I have thoroughly investigated this matter.
>
> AT&T has no record that you ever completed a form requesting re-employment with Michigan Bell. Also, I have discussed this matter with Dominic Guadagni concerning the six months issue. Dominic recalls making you aware of a job opportunity with Michigan Bell within six months of your layoff with AT&T which you declined. Enclosed please find copies of the letters from Chuck Sawyer and Dominic Guadagni.
>
> There is nothing else the Communications Workers of America can do on your behalf. [R. 5: Affidavit of Richard T. Jordan, Exhibit A.]

On July 28, 1993, Zimmer again wrote to Mr. Jordan. R. 9: Zimmer to Jordan (July 28, 1993). In this letter, Mr. Zimmer requested "all documentation concerning a grievance I had filed with the CWA just prior to my termination." *Id.* In addition, Mr. Zimmer requested the names, seniority dates, and current employment status of

all employees laid off by AT&T in Michigan during 1989. *Id.* Mr. Jordan did not reply to this letter. App. 8.

The CWA Constitution contains an Internal Appeals Procedure, whereby members of the Union, such as Mr. Zimmer, may appeal a decision not to process a grievance. R. 12: Internal Appeals Procedure, CWA Constitution pp. 24-25, Exhibit to Affidavit of Morton Bahr. The Constitution specifies that appeals under this procedure must be filed in the CWA President's office within sixty days of the challenged decision and must be in writing and signed by the appealing member. R. 12: Internal Appeals Procedure ¶ II 1, CWA Constitution p. 25. Mr. Zimmer did not pursue an appeal under the CWA Procedure. R. 12: Affidavit of Morton Bahr ¶ 7. *See* App. 21.

On February 1, 1994, Mr. Zimmer filed his complaint in this action, alleging the AT&T and Michigan Bell had breached their collective bargaining agreements with CWA and that CWA and Local 4009 had breached their duty of fair representation in handling Mr. Zimmer's request to file a grievance.

The complaint was filed more than seven months after Mr. Zimmer received the letter from CWA Representative Jordan stating that "[t]here is nothing else the Communications Workers of America can do on your behalf." R. 5: Exhibit A to the Affidavit of Richard T. Jordan. The district court, therefore, dismissed Mr. Zimmer's action as barred by the six month limitations period contained in § 10(b) of the National Labor Relations Act, as amended, 29 U.S.C. § 160(b). App. 22. After hearing oral argument on Mr. Zimmer's appeal, the Sixth Circuit affirmed the district court's decision in an unpublished *per curiam* opinion. App. 1-2.

ARGUMENT

1. Mr. Zimmer's petition for certiorari represents little more than a stubborn refusal to accept this Court's decision *DelCostello v. Teamsters*, 462 U.S. 151 (1983).

In *DelCostello*, the Court described the nature of lawsuits, such as that filed by Mr. Zimmer, in the following terms:

> Such a suit, as a formal matter, comprises two causes of action. The suit against the employer rests on § 301, since the employee is alleging a breach of the collective bargaining agreement. The suit against the union is one for breach of the union's duty of fair representation, which is implied under the scheme of the National Labor Relations Act. [*DelCostello v. Teamsters*, 462 U.S. 151, 164 (1983) (footnote omitted).]

And the Court held that this "hybrid § 301/fair representation claim" is governed by the six month limitations period in NLRA § 10(b). *Id.* at 172.

Mr. Zimmer's primary argument is that the *DelCostello* Court was wrong to reach this conclusion, because the Rules of Decision Act requires that the most analogous state statute of limitations be applied whenever a federal statute does not contain a limitations period. Pet. 11-27. The Court rejected this argument in *DelCostello*, 462 U.S. at 159-160 n.13, and it should now be obvious that "a clear majority of the Court [has] rejected such a single path." *Agency Holding Corp. v. Malley-Duff & Associates, Inc.*, 483 U.S. 143, 146 (1987).

Mr. Zimmer's secondary criticism of *DelCostello* is that "29 USC § 160(b) was not written expressly to apply to § 301 hybrid cases." Pet. 27. This is hardly surprising, as Congress did not create the "hybrid § 301/fair representation claim." That claim, or at least its fair representation component, was implied from the National Labor Relations Act by this Court. *DelCostello*, 462 U.S. at

164. The unfair labor practice claims defined in NLRA § 8 are expressly subject to the six month limitations period in § 10(b) of that Act. As this Court has recently observed, "where, as here, the claim asserted is one implied under a statute that also contains an express cause of action with its own time limitation, a court should look first to the statute of origin to ascertain the proper limitations period." *Lampf v. Gilbertson*, 501 U.S. 350, 359 (1991).

2. Aside from challenging a settled precedent that this Court has not indicated it is ready to overturn, the petition for certiorari presents the eminently uncertworthy question: whether there is "a question of fact as to when the statute of limitations commenced" in this case. Pet. i. While the "Questions Presented" portion of the petition suggests that the alleged dispute of fact concerns "the interpretation of a letter," *id.*, the corresponding section of the "Reasons for Granting Petition" ignores altogether the letter received by Mr. Zimmer from the union and instead asserts that the limitations period should be tolled because he "relied on what he thought were genuine internal remedies, and pursuant to that belief, he refrained from suing the Union and his employers." Pet. 11. Whichever it is, the district court was undoubtedly correct in granting summary judgment and the court of appeals was equally sound in affirming that ruling.

On May 27, 1993, Mr. Zimmer wrote to CWA Representative Richard Jordan asking, "Will the CWA file a grievance against AT&T and Michigan Bell on my behalf, followed by arbitration if necessary?" R. 27-1: Zimmer to Jordan (May 27, 1993). And Mr. Jordan responded by informing Mr. Zimmer that "I have thoroughly investigated this matter[,] AT&T has no record that you ever completed a form requesting re-employment with Michigan Bell[, and] . . . [t]here is nothing else the Communications Workers of America can do on your behalf." R. 5: Affidavit of Richard T. Jordan, Exhibit A. Even

now, Mr. Zimmer does not explain how this response could be taken as anything other than an unambiguous refusal to file the grievance requested in his May 27th letter.

Mr. Zimmer argues that the limitations period should be tolled because he "continued seeking his internal Union remedies after he received the June 23, 1993 letter as is evident by his July 28, 1993 letter to the Union requesting grievance information." Pet. 10. However, Mr. Zimmer's July 28, 1993 letter does *not* inquire as to the status of his recall grievance. Instead, that letter requests "all documentation concerning a grievance I had filed with CWA *just prior to my termination.*" R. 9: Zimmer to Jordan (July 28, 1993) (emphasis added).[2] That inquiry obviously could not concern the grievance that Mr. Jordan refused to file over the failure of Michigan Bell to recall Mr. Zimmer *years after* his termination. The President of CWA, in whose office such appeals would be filed under the CWA Constitution, has testified that he never received any appeal from Mr. Zimmer challenging the decision not to file his grievance. R. 12: Affidavit of Morton Bahr ¶ 7. Thus, the district court's refusal to toll the limitations period on these grounds was clearly not an abuse of discretion. *Robinson v. Central Brass Mfg. Co.*, 987 F.2d 1235, 1242 (6th Cir.), *cert. denied*, 114 S.Ct. 92 (1993).

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[2] In another paragraph, Mr. Zimmer's letter goes on to request the names, seniority dates, and current employment status of all employees laid off by AT&T in Michigan during 1989. R. 9: Zimmer to Jordan (July 28, 1993). While this may have related to his recall claim, simply asking for this information hardly constitutes an inquiry concerning the status of his rejected grievance, much less an internal union appeal.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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